91-1618

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Whether the district court erroneously held that state reapportionment officials must, as a prerequisite to redistricting, conduct a totality of circumstances analysis adopted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Whether the district court erroneously shifted the burden of proof from plaintiffs attacking legislative districts as diluting minority voting strength to defendant reapportionment officials by requiring them to prove a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, prior to the creation of any minority controlled state legislative districts.

Whether the district court's finding of a violation of § 2 of the Voting Rights Act is erroneous.

Whether the district court erroneously enjoined the primary election for members of the Ohio General Assembly and appointed a special master to redraw Ohio's state legislation districts without first affording defendants a reasonable opportunity to adopt substitute districts.

Whether the district court's finding of a violation of the Fifteenth Amendment is erroneous.

Whether the district court's finding of a violation of the Fourteenth Amendment is erroneous.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District, MARY ABEL, Representative of the 94th Ohio House District, and WILLIAM MALLORY, Representative of the 23rd Ohio House District.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The January 31, 1992 Opinion and Order of the three-judge court has not yet been officially reported. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and is set out in the accompanying Appendix at App. 1a. "Appendix 2" to Judge Dowd's dissenting opinion was filed on February 3, 1992, and is set out in the accompanying Appendix at App. 47a.

The February 18, 1992 Findings and Conclusions of the Ohio Apportionment Board, on remand following the January 31, 1992 Opinion and Order of the three-judge

court, were filed with the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and are set out in the accompanying Appendix at App. 160a.

The March 10, 1992 Order of the three-judge court has not yet been officially reported. It is set out in the accompanying Appendix at App. 118a.

The March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge district court has not yet been officially reported. It is set out in the accompanying Appendix at App. 127a.

The March 31, 1992 Order of the three-judge district court has not yet been officially reported. It is set out in the accompanying Appendix at App. 324a.

JURISDICTION

The Orders appealed from were filed on March 10, 1992, March 19, 1992, and March 31, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 14.1(f), the text of constitutional, statutory, and other provisions involved in this case is set out in the accompanying Appendix at App. 274a.

STATEMENT OF THE CASE

On March 10, 1992, the three-judge court in this case, convened pursuant to 28 U.S.C. § 2284(a), in a two-to-one decision, enjoined the 1991 plan of apportionment for members of the Ohio General Assembly and appointed a special master to reconfigure the districts. In addition, the district court enjoined the May 5, 1992, Ohio primary and established June 2, 1992, as the date of the new election:

> Accordingly, the date of May 5, 1992 for the holding of the Ohio primary election is vacated to the extent that candidates for election to the General Assembly are concerned, and the appropriate election officials are enjoined and directed to cause such primary election to be held on June 2, 1992, provided, however, that on proper showing the court may provide an alternate date.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 119a-120a (N.D. Ohio March 10, 1992) (*per curiam*). It is this Order, as well as the Orders of March 19, 1992, and March 31, 1992, from which Appellants have appealed.[1] In its Order of March 10, 1992, the district court concluded that the 1991 plan of apportionment for members of the Ohio General Assembly violated § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Fifteenth Amendment to the United States Constitution. In its Order of March 19, 1992, the court further concluded that the plan violated the Fourteenth Amendment. In the Order of March 31, 1992, the district court further postponed the primary election for members of the Ohio General Assembly to September 8, 1992.[2]

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[1] Appellants Voinovich, Aronoff, and Taft are three of the five "persons responsible for the apportionment of [the State of Ohio] for members of the General Assembly." Ohio Const., Art. XI, § 1. Appellant Tilling is the Secretary to the Apportioning Persons. Plaintiffs-Appellees Thomas E. Ferguson, Auditor of State of Ohio ("Ferguson") and Barney Quilter, Speaker Pro Tempore of the Ohio House of Representatives ("Quilter"), are the remaining two apportioning persons. Plaintiffs-Appellees Richard Cordray, Paul Mechling, Ronald Gerberry, Mary Abel, and William Mallory are incumbent Democratic Members of the Ohio House of Representatives. The remaining Plainitffs-Appellees are largely Democratic party appointees who were recruited by William Pfeiffer, Chief Executive Officer to the Speaker of the Ohio House of Representatives, to serve as plaintiffs in this case (collectively, "Appellees").

[2] In part because of the district court's earlier order setting June 2, 1992 as the date for the primary election for members of the General Assembly, the state moved the entire Ohio primary to

Appellees commenced this action on November 1, 1991 in the United States District Court for the Northern District of Ohio. Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit appointed Circuit Judge Nathaniel R. Jones and Senior Circuit Judge John W. Peck to the three-judge panel designated to hear the case. District Judge David D. Dowd, Jr. was the third member of the three-judge court.[3]

On November 14, 1991, the District Court advised counsel that this case would be tried on December 3, 1991. Appellants had not yet filed an answer in the case, and under Fed.R.Civ.P. 12(a), were not required to do so before November 21, 1991. On November 22, 1991, Judge Dowd conducted a status conference and advised counsel that evidence was to be submitted by affidavit or deposition. The Court indicated that it would hear no live testimony.

June 2, 1992. As noted in the Affidavits of Secretary of State Taft and Chief Elections Counsel John F. Bender, submitted in support of Appellants' Application for Stay, the holding of two primaries will cost the state approximately six million dollars. Because the district court has now moved the primary for members of the General Assembly to September 8, 1992, unless this Court grants Appellants' Application for Stay, the state will incur this unnecessary expenditure.

[3] Prior to the commencement of this case, Appellants Voinovich, Aronoff, and Taft had commenced an original proceeding in the Ohio Supreme Court concerning the 1991 reapportionment. On February 14, 1992, after the litigation completed its tortuous path through the United States District Court for the Southern District of Ohio and the United States Court of Appeals for the Sixth Circuit, the Ohio Supreme Court issued a decision in which it concluded that the plan of apportionment was constitutional under the Ohio Constitution, specifically declaring valid the districts which the district court, in its March 19, 1992 opinion, declared violative of the Fourteenth Amendment. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). A more complete history of the *Voinovich* litigation appears at n.1 of Appellants' Application for a Stay.

The case was heard by the district court on December 3 and 17, 1991.[4] Following opening arguments on December 3, 1991, each side was allowed only three hours on December 17, 1992, in which to present its case.

On January 31, 1992, the district court issued an Opinion and Order in which a majority of the district court concluded that Appellants were not permitted to create minority controlled state legislative districts without first "justifying" their creation under § 2 of The Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, i.e., establishing that the state legislative districts had diluted minority voting strength in the past, and that the creation of minority controlled districts was "justified" under the "totality of the circumstances" test of *Thornburg v. Gingles*, 478 U.S. 30 (1986). The district court, in essence, shifted the burden of proof from plaintiffs attacking the new districts as diluting minority voting strength under § 2 of the Voting Rights Act, see *Thornburg v. Gingles*, *supra*, to the apportioning officials to show that the prior districts did dilute minority voting strength:

> Accordingly, we find that no adequate totality of the circumstances analysis was performed by the Board. In the absence of such an analysis, there can be no reliable finding of a violation. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 14a (N.D.Ohio Jan. 31, 1992). Judge Dowd dissented, finding that Plaintiffs failed to satisfy their burden of proof that the 1991 Ohio plan of apportionment diluted minority

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[4] The court, from the bench and without discussion, denied Appellants' motion for abstention.

voting strength. On February 3, 1992, Judge Dowd issued "Appendix 2" to his dissenting opinion, an appendix consisting of detailed fact findings supporting his dissent. App. 47a.

Appellants, expressly reserving any argument they had that the district court's Opinion and Order of January 31, 1992, was contrary to law, reconvened the Apportionment Board for the purpose of receiving evidence, from both the Board's majority and its minority members, concerning the totality of the circumstances justifying the creation of minority controlled districts under the 1991 plan of apportionment. At the conclusion of the February 18, 1992, session of the Apportionment Board, the Board, by a three-to-two vote, adopted Findings and Conclusions stating that the evidence received "justified" the Board's creation of minority controlled state legislative districts.[5] App. 160a.

On March 10, 1992, the district court, in a two and one-half page decision and again by a two-to-one vote, ruled that Appellants had failed to "justify" the creation of minority controlled districts. In one sentence, and without explanation, the court also found a violation of the Fifteenth Amendment to the United States Constitution:

> As noted in the Conclusion of our January 31, order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan

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[5] Minor adjustments were made in several of the districts, including some of the majority-minority districts, in order to make several technical corrections to the plan of apportionment as authorized by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). Those corrections affected the percentages of minority populations in some of the districts, but the changes were also supported by Defendants' thorough totality of the circumstances analysis. In its decision of March 19, 1992, the district court referred to the 1991 plan of apportionment, as corrected on February 18, 1992, as the "1992 plan."

as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 119a (N.D.Ohio March 10, 1992) (*per curiam*). Consequently, the court ruled that the 1991 plan of apportionment was unlawful and ordered that a special master be appointed to redraw Ohio's state legislative districts. As previously noted, the district court majority also enjoined the May 5, 1992 Ohio primary election. Judge Dowd again dissented.

On March 11, 1992, Appellants filed their Notice of Appeal to this Court in the district court, App. at 149a, and moved the district court to stay its Order of March 10, 1992.[6] The district court, in an order issued on March 19, 1992, denied the motion for a stay of its March 10, 1992 Order. In addition, however, the court went on, in Part V of its decision, to find that the 1991 plan of apportionment was also violative of the Fourteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 146a (N.D.Ohio March 19, 1992) (*per curiam*). Accordingly, Appellants also noticed their appeal from the March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the district court. App. at 156a. Ap-

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[6] The Notice of Appeal actually listed both the January 31, 1992 Opinion and Order and the March 10, 1992 Order as the orders of the district court from which the Appellants appealed. On March 19, 1992, the parties stipulated to the dismissal of the appeal from the January 31, 1992 Order. App. at 153a. There is no question, however, that the district court's conclusions in its January 31, 1992 Opinion and Order (which were in substantial part reiterated in the March 19, 1992, Order) are properly the subject of this appeal. See *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1974) (holding that an appeal of an order pursuant to 28 U.S.C. § 1253 brings the "whole case" before the Court for review). Cf. *Arthur v. Nyquist*, 547 F.2d 7, 9 (2d Cir. 1976) (noting that "an interlocutory order from which no appeal has been taken merges into the final decree").

pellants also noticed their appeal from the March 31, 1992 Order fixing September 8, 1992 as the primary date for members of the Ohio General Assembly. App. at 325a.

This Court has not yet ruled on Appellants' application for a stay of the district court's Order of March 10, 1992.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION.

This case involves several substantial questions concerning the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution as these provisions are applied to a state's reapportionment of its state legislative districts. Specifically, this case involves the ability of state officials to avoid diluting minority voting strength in such redistricting by ensuring that no sufficiently large and geographically compact protected minority group is fragmented between two or more districts. The district court concluded that the majority of the Ohio Apportionment Board was not permitted to avoid such dilution without first conducting a totality of the circumstances analysis adopted by this Court in *Thornburg v. Gingles*, *supra*, a position heretofore not adopted by *any* court. Moreover, the district court erroneously concluded that the totality of the circumstances analysis performed by Board upon remand from the January 31, 1992 Opinion and Order of the district court was insufficient to support the creation of minority controlled districts.

In addition, the district court, initially without any discussion of the element of discriminatory motive, ruled that in addition to violating § 2 of the Voting Rights Act, Appellants violated the Fifteenth Amendment to the United States Constitution. In its opinion of March 19, 1992, the district court attempted to bolster its finding of intentional discrimination by pointing to evidence merely showing that persons not involved in the drawing of dis-

trict lines suggested that the Voting Rights Act be used for political advantage. There was no finding that Appellants accepted the suggested advice, and indeed, any finding of discriminatory motive is contrary to all evidence of record.

The lower court, as an afterthought in its Order of March 19, 1992, also concluded that the plan of apportionment violated the Fourteenth Amendment to the United States Constitution, despite the fact that the "underpopulated districts" had earlier been declared lawful by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), and despite the clear state policy of avoiding the crossing of county lines in drawing state legislative districts, a legitimate policy this court has recognized as justifying a total deviation of more than 10% for state legislative districts. *Mahan v. Howell*, 410 U.S. 315 (1973).[7]

Finally, the district court also erred by appointing a special master to reconfigure the districts for members of the Ohio General Assembly without first affording the state a reasonable opportunity to adopt a substitute re-

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[7] In the plan of apportionment as amended on February 18, 1992, the largest house district, House District 20 (Cuyahoga County), has a population of 114,943, or 104.91% of the "ideal population" of 109,567, *i.e.*, one house ratio. The smallest house district, House District 5 (Ashtabula County), has a population of 99,281, or 91.10% of the ideal, for a maximum deviation of 13.81%, *i.e.*, 104.91% minus 91.10%. Ashtabula County was kept as a single whole county house district pursuant to Article XI, §§ 9 and 10(B) of the Ohio Constitution, which permit a county within plus or minus 10% of the ideal population to be designated as a house district.

The largest senate district, Senate District 1 (HD82, HD83, and HD86), has a population of 343,582, or 104.53% of the ideal population of 328,700, *i.e.*, one senate ratio. The smallest senate district, Senate District 32 (HD66, HD67, and HD68), has a population of 308,942, or 93.99% of the ideal, for a maximum deviation of 10.54%, *i.e.*, 104.53% minus 93.99%.

apportionment plan, see *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978), an action which greatly encroaches upon the state's autonomy and self government. The enjoining of Ohio's electoral process and the fixing of a separate date for the state's primary for members of its General Assembly also encroaches upon the state's autonomy.

II. THE DISTRICT COURT ERRONEOUSLY REQUIRED DEFENDANTS TO PROVE A PAST VIOLATION OF § 2 OF THE VOTING RIGHTS ACT PRIOR TO THEIR CREATION OF MINORITY CONTROLLED DISTRICTS UNDER THE 1991 PLAN OF APPORTIONMENT, THUS SHIFTING THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS.

In its opinion of January 31, 1992, the district court prevented the Apportionment Board from implementing the policy of the state of drawing minority controlled districts without first proving that the prior plan violated § 2 of the Voting Rights Act. The district court found a violation of § 2 because the Appellants did not properly conduct the analysis that this Court prescribed for lower courts to use when assessing redistricting plans. *Thornburg v. Gingles*, 478 U.S. 30 (1986). This determination was erroneous because, as noted by Judge Dowd, the *Gingles* analysis is not a prerequisite to redistricting:

> The majority opinion appears to declare that the Voting Rights Act requires that there be an established violation before an apportionment board is entitled to apportion a district with a significant black population. This argument places the cart before the horse because the totality of the circumstances test, derived from the Voting Rights Act, is a tool that is to be utilized by the district court in evaluating the *plan before it*, and not as a prerequisite to redistricting.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 31a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting) (em-

phasis in original).[8] The district court, in effect, relieved the plaintiffs of the burden of showing minority vote dilution and shifted the burden to defendants by requiring them to show a past violation of § 2 of the Voting Rights Act and/or that their redistricting plan does not presently violate § 2.[9]

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[8] The legislative history of the 1982 amendments to the Voting Rights Act supports Judge Dowd's observation. Congress continually referred to the totality of the circumstances or "results test" as a vehicle for plaintiffs alleging minority vote dilution to attack district boundaries, not as an analysis to be conducted by state officials as a prerequisite to their redistricting. See generally S. Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Admin. News 177.

[9] In its March 19, 1992 Order, the district court attempted to back away from this position:

> Defendants, as well as the dissent from our January 31, 1992 Opinion and Order, distort this aspect of the Court's opinion. They imply that this Court had held that an apportioning board must engage in a totality-of-circumstances analysis prior to any racially conscious redistricting. They similarly imply that this Court held that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation, unless if first analyzes the totality of the circumstances. Neither of these contentions is true.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 130a-131a (N.D. Ohio March 19, 1992) (*per curiam*). Later in the Court's March 19, 1992 Order, however, the district court once again revealed that it did indeed hold that apportioning officials must first conduct a totality of the circumstances analysis prior to any attempt to avoid minority vote dilution:

> If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. *Whether such a Board is competent in the first instance to make the necessary totalities evaluation re-*

The district court's decision of January 31, 1992, is contrary to every decision relating to the creation of minority controlled districts. The Voting Rights Act has consistently been interpreted to require a state to address the dilution of minority voting in the apportionment process. *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991); *Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989), *aff'd*, 111 S.Ct. 662 (1991).[10]

In *United Jewish Organizations, Inc. v. Carey*, *supra*, this Court concluded that redistricting officials satisfied their obligation under § 5, 42 U.S.C. § 1973c, "where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority." 430 U.S. at 159. The Court in *Carey* further held that "compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines." 430 U.S. at 159. The Court approved the use of racial criteria in drawing district lines under § 5 of the Voting Rights Act:

> [T]he Constitution does not prevent a State subject to the Voting Rights Act from *deliberately creating or preserving black majorities in particular districts* in order to insure that its reapportionment plan complies with § 5.
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> • • • •

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quired by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 140a (N.D. Ohio March 19, 1992 *(per curiam)* (emphasis added) (citations omitted).

[10] *United Jewish Organizations, Beer, Garza*, and *Jeffers* are not even cited in either the January 31, 1992, or the March 10, 1992, majority opinions of the district court. The court attempted to distinguish these cases in its March 19, 1992 opinion.

> [N]either the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. Nor is petitioner's second argument valid. *The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or reapportionment.*

430 U.S. at 159, 161 (emphasis added). Indeed, this Court in *Carey* explicitly held that a State was permitted to creat minority controlled districts in order to avoid minority vote dilution, even if this was done at the expense of white voters:

> If this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

430 U.S. at 167-68.[11]

Similarly, in *Garza v. County of Los Angeles, supra*, the court concluded that "[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court by a political entity in the first instance, does not violate the Constitution." 918 F.2d at 776.

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[11] In its Order of March 19, 1992, the district court distinguished *United Jewish Organizations* and *Beer* by noting that they were § 5 cases, while the present action is a § 2 case, thus apparently concluding that the principles enunciated in these cases are inapplicable in cases commenced under § 2 of the Voting Rights Act. The applicability of these principles to § 2 cases, in and of itself, presents a substantial question which should be addressed by this Court.

Further, contrary to the district court's Opinion and Order of January 31, 1992, it is well established that an apportionment body must address minority vote dilution in the apportionment process without the need to await a prior adjudication. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Garza v. County of Los Angeles, supra; Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991).

Furthermore, the district court's decision is contrary to the recent decisions of the California Supreme Court, federal courts in Illinois and Texas, and the Minnesota Redistricting Panel. In *Wilson v. Eu*, 4 Cal.Rptr.2d 379 (Cal. 1992), the California Supreme Court adopted redistricting plans for the California Assembly, Senate and Congressional delegation after the state legislature's failure to enact plans in time for the 1992 elections.[12] The court, relying upon *United Jewish Organizations, supra*, and *Garza, supra*, adopted the special masters' report, which "attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district." 4 Cal.Rptr.2d at 383. Interestingly, the California special masters' approach was the same approach used by the majority of the Apportionment Board in Ohio:

> In preparing our redistricting plans, we determined that it is important to eliminate, or at least minimize, any possibility of their being challenged under section 2. The ultimate success of any such challenge would depend not only on the composition of the new districts themselves but also on evidence, not now before us, of historic voting patterns or socioeconomic data, and probably also on resolution of open legal questions concerning interpretation or application of the Act. Rather than speculating on such eivdence, or attempting to resolve all such legal is-

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[12] The court essentially adopted the Report and Recommendations of the Special Masters it had earlier appointed to handle the matter. See *Wilson v. Eu*, 54 Cal.3d 471 (1991).

sues, we have endeavored to draw boundaries that will withstand section 2 challenges under any foreseeable combination of factual circumstances and legal rulings.

* * * *

The [*Gingles*] court listed three "necessary preconditions" to the sustaining of a [§ 2] claim:

"First, the minority group must be able to demonstrate that it is *sufficiently large* and *geographically compact* to constitute a majority in a single-member district."

"Second, the minority group must be able to show that it is *politically cohesive*."

"Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."

* * * *

We can avoid section 2 challenges to our new districts by eliminating the possibility of a minority group's proving any one of three *Thornburg* prerequisites. The information from which our districts are drawn is furnished by the 1990 federal census, which tells us, as to each census tract, the total number of persons together with the numbers in particular categories of age, race, and Latino origin. From that data, we can judge whether minority groups are "sufficiently large and geographically compact" to satisfy the first *Thornburg* prerequisite. The second and third prerequisites, however, depend on what analyses of election results would show about a minority's political cohesiveness and about White majority bloc voting. In this area, the federal census is of little help.

We have therefore drawn district lines so as to avoid either (1) unnecessary fragmentation of any sufficiently large, geographically compact protected minority group into two or more districts, or (2) overconcentration of such a group in a single district.

> By thus preventing the dilution of the votes of any minority group that could qualify under the first *Thornburg* prerequisite, we can eliminate the possibility of section 2 challenges regardless of whether a group could fulfill the second or third prerequisite.

4 Cal.Rptr.2d at 397, 399 (footnotes and citations omitted). The California Supreme Court's decision that apportioning officials may create minority controlled districts in order to avoid a successful Voting Rights Act challenge is inconsistent with the district court's holding in this case.

In *Hastert v. State Bd. of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), the United States District Court for the Northern District of Illinois concluded that "[r]acial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act." 777 F.Supp. at 650-51 (citations omitted).

Similarly, the United States District Court for the Western District of Texas, in refusing to issue a preliminary injunction against the state legislature's Congressional redistricting plan, approved of the use of racial criteria in drawing districts. *Terrazas v. Slagle*, Nos. A-91-CA-425, 426, & 428, App. at 302a (W.D.Tex. Dec. 24, 1991).[13]

In *Cotlow v. Grove*, No. C8-91-985, App. at 287a (Minn. Redistricting Panel Nov. 21, 1991), a special judicial redistricting panel appointed by the Minnesota Supreme Court held that "[w]here a concentration of a racial or language minority makes it possible, the districts must increase the probability that members of the

---

[13] The *Terrazas* Court found that the state legislature's plan for redistricting the state house and senate violated the Voting Rights Act by not creating enough Hispanic and African-American districts, and accordingly enjoined implementation of that plan. This Court refused to stay the three-judge district court's decision in the *Terrazas* case. *Slagle v. Terrazas*, 112 S.Ct. 1075 (1992).

minority will be elected." *Cotlow v. Growe*, App. at 291a (emphasis added).[14] The Minnesota court's holding is consistent with the Appellants' position in this case that they did not violate § 2 of the Voting Rights Act by creating minority controlled districts in an effort to avoid a successful challenge to the 1991 plan of apportionment.

Because the district court, contrary to every court which has considered this issue, prohibits state redistricting officials from exercising their legitimate discretion to avoid minority vote dilution and, in effect, shifts the burden of proof to apportioning officials to show the lack of minority vote dilution, this Court should note probable jurisdiction and reverse the decision of the district court.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED, UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, TO JUSTIFY THEIR CREATION OF MAJORITY-MINORITY DISTRICTS IN THE 1991 PLAN OF APPORTIONMENT.

In its Order of March 10, 1992 the district court compounded its error of January 31, 1992, by concluding, against the overwhelming weight of evidence, that Appellants had failed to "justify" their creation of minority controlled districts, under the totality of the circumstances test of *Thornburg v. Gingles*, *supra*. As Judge Dowd found, the Findings of the Apportionment Board were exhuastive:

> On February 20, 1992 the defendants Voinovich, Taft, and Aronoff filed findings and conclusions with respect to the creation of the majority-minority districts. The findings number 254 paragraphs and 106 pages and address such issues as History of Official Discrimination, Racial Bloc Voting, Racial Barriers to Effective Participation, Effects of Discrimination,

---

[14] This Court vacated a three-judge district court's stay of this state court decision. *Cotlow v. Emison*, 112 S.Ct. 855 (1992). This Court recently noted probable jurisdiction in an appeal from the final decision of the federal court. *Growe v. Emison*, 60 L.W. 3669 (1992).

> Summary of Unemployment Rates by Race, Showing Disparate Unemployment Rates as to Blacks, Mean Household Income showing a great disparity between white and black households, an Analysis of Families Living Below Poverty Level, showing great disparity between white and black families, Education Findings, demonstrating that the percentage of blacks that have not completed high school and who have not completed one or more years of college are significantly higher than whites, findings that the value of housing between white families and black families are grossly disproportionate, the effects of overt or subtle racial appeals in the political process, the extent to which minorities had been elected to public office, and the lack of success of minorities in the election process in the major urban counties in Ohio other than Cuyahoga.

Quilter v. Voinovich, No. 5:91CV-2219, slip op. at 1 n.1 (N.D. Ohio March 10, 1992) (Dowd, J., dissenting). Accordingly, even if this Court determines that Appellants were required to satisfy the *Gingles* test as a prerequisite to redistricting, we submit that the decision below was erroneous and should be reversed.

As Judge Dowd noted, the evidence "justifying" the creation of minority controlled districts was overwhelming, yet the lower court majority ruled that Appellants had failed to satisfy their burden of proof. See *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 119a (N.D.Ohio March 10, 1992) (*per curiam*) ("Accordingly, the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965."). Thus, the lower court not only ruled that the Board failed to satisfy its *burden* of proof, but by according absolutely no deference to the Board's exhaustive findings, it apparently held the Board to an improperly stringent *standard* of proof. Even if this Court were to rule that a state must "justify" its creation of minority controlled districts prior to their adoption, the standard of proof that

a state, in the first instance, must satisfy in its attempt to comply with the Voting Rights Act, as well as the proper deference a reviewing court must give to the state apportioning body's findings, are substantial questions on which this Court should note probable jurisdiction.

IV. A DISTRICT COURT MAY NOT APPOINT A SPECIAL MASTER TO REDRAW STATE LEGISLATIVE DISTRICTS WITHOUT FIRST AFFORDING THE STATE'S APPORTIONING OFFICIALS A REASONABLE OPPORTUNITY TO ADOPT A SUBSTITUTE PLAN.

In its decision of March 10, 1992, the district court appointed a special master to draw a new plan of apportionment for the members of the Ohio General Assembly. That appointment exceeds the clear limitations imposed by this Court on a district court's remedial powers in reapportionment cases:

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. *When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.* The new legislative plan, if forthcoming, will then be the governing law unless it, too, is challenged and found to violate the Constitution. "[A] state's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978) (citation omitted) (emphasis added). See also *Burns v. Richardson*, 384 U.S. 73, 85 (1966).

Although the district court suggested that the Apportionment Board failed *twice* to adopt a valid plan, it must be emphasized that the court, in its Opinion and Order of January 31, 1992, did *not* invalidate the 1991 plan of apportionment. Rather, the district court found insufficient evidence to support the creation of minority controlled districts in the plan. Accordingly, the Board was ordered to reconsider the plan to show "justification" for such districts. The Board did exactly that when it reconvened to receive evidence regarding the totality of the circumstances, and when it issued findings and conclusions setting forth the basis for the creation of minority controlled districts.

The district court's determination on March 10, 1992—that the creation of minority controlled districts was not justified, *i.e.*, that the plan is invalid—was thus the first and only such declaration. Contrary to the clear dictates of this Court, the district court did not afford the Board a reasonable opportunity to adopt a substitute plan, which plan would "be the governing law." *Wise*, 437 U.S. at 540. In not affording the Board such an opportunity, as well as in arbitrarily fixing September 8, 1992, as the date of the primary election for members of the Ohio General Assembly, the district court encroached upon the autonomy of the state to reapportion its own state legislature—an autonomy that has long been recognized by this Court. This encroachment raises a substantial question on which this Court should note probable jurisdiction.[15]

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[15] Indeed, at its sessions following the district court's remand of January 31, 1992, the Board considered two alternatives ("Amendment E" and "Amendment F"). Amendment E reduced the relative minority population to approximately the same levels as existed under the 1981 apportionment, while Amendment F reduced the relative minority population in Cuyahoga County districts by creating five, rather than four, minority controlled districts within that county. The Board advised the district court that the 1991 plan as corrected best satisfied the Board's totality of circumstances analysis, but that Amendments E and F were acceptable

V. THE DISTRICT COURT'S HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS ERRONEOUS AND MUST BE REVERSED.

As previously noted, the district court found in one sentence that the 1991 plan of apportionment violated the Fifteenth Amendment:

> As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 119a (N.D. Ohio March 10, 1992) (*per curiam*). The district court did not discuss the element of discriminatory motive that this Court has clearly held must be proved in order to establish a Fifteenth Amendment claim. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").[16] In its decision of March 10, 1992, the court pointed to no evidence that Appellants' creation of minority controlled districts was done with any conceivable discriminatory motive.

The district court attempted to bolster its finding of a Fifteenth Amendment violation in its opinion of March 19, 1992:

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alternatives the court could consider. The district court considered neither of these alternatives.

[16] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court concluded that "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part "because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 446 U.S. at 71 n.17 (citation omitted). See also *Flanagan v. Gillmor*, 561 F.Supp. 36, 45 (S.D. Ohio 1982) (three-judge court), *aff'd*, 467 U.S. 1223 (1984).

> Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally and for political advantage in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 142a-143a (N.D. Ohio March 19, 1992) (*per curiam*) (footnotes and citations omitted).[17] In its footnotes, the court pointed only to evidence that persons not involved in drafting the apportionment plan attempted to influence Appellants to use the requirements of the Voting Rights Act for partisan political advantage. App. at 142a-143a n.8 & 9.[18]

Indeed, there can be no legitimate finding that minority controlled districts under the 1991 plan of apportionment were drawn with discriminatory motive. As Judge Dowd noted in his dissenting opinion, the Ohio NAACP fully endorsed the minority controlled districts under the 1991 plan of apportionment. *Quilter v. Voino-*

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[17] The district court attempted to apply the sound holding of *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), but overlooks two key points of that decision. The *Garza* court held that in order for political motivation to be intentional discrimination, (1) the instrument for executing that political motivation must have a dilutive effect on minority voting strength, and (2) the dilutive effect must be known to the political body making the decision. There is no proof of either of these elements in the case at bar.

[18] There is no evidence that Appellants were indeed influenced by these attempts. Indeed, Dr. Gary King, Professor of Government at Harvard University and a nationally recognized expert in the field, testified that the 1991 plan of apportionment has a partisan bias of zero, while the proposed plan submitted by Appellees Ferguson and Quilter was biased in favor of Democrats and the proposed plan submitted by the Ohio Republican Party was biased in favor of Republicans.

vich, No. 5:91CV-2219, App. at 28a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting). Indeed, as conveniently ignored by the majority below, the NAACP submitted a proposed plan of apportionment for Ohio's urban counties, *which plan was fully incorporated into the plan drafted by Appellants.* The only changes to the NAACP plan as adopted, other than the technical corrections made on February 18, 1992, were in Cuyahoga County following negotiations between Appellants, the Ohio NAACP, the Black Elected Democrats of Ohio ("BEDO"), and the Black Elected Democrats of Cleveland, Ohio ("BEDCO"). All of these groups endorsed the final districts in Cuyahoga County. It is inconceivable, therefore, that Appellants adopted the 1991 plan of apportionment because of its adverse effects upon the minority community in Ohio. See *Flanagan v. Gillmor*, 561 F.Supp. at 46 ("The conclusion that no impermissible racial motivation accounted for district line drawing by the drafters of [Ohio's 1981 Congressional redistricting plan] is bolstered by the bipartisan efforts to avoid diluting black voting power in the redistricting of the northeastern Ohio area . . . .").

In light of this factual background, as well as the district court's failure to make adequate findings of discriminatory motive, it is evident that the court simply eliminated discriminatory motive as an element of a Fifteenth Amendment claim. Accordingly, this Court should note probable jurisdiction and reverse the decision of the lower court.

VI. THE DISTRICT COURT'S FINDING OF A VIOLATION OF THE FOURTEENTH AMENDMENT IS ERRONEOUS AND MUST BE REVERSED.

In its decision of March 19, 1992, denying Appellants' motion for a stay, the district court, for the first time in this proceeding, also found that the 1991 plan of apportionment violated the Fourteenth Amendment with respect to three house districts created pursuant to Article

XI, §§ 9 and 10(B) of the Ohio Constitution. Those sections, expressing a constitutional policy of designating single counties as whole house districts where reasonably possible, permit the Apportionment Board to designate a county as a house district when its population is within 10% of the ideal population. The lower court also found that one senate district (Senate District 32), which was approximately 94% of the ideal district ratio, violated the Fourteenth Amendment.[19]

The lower court's findings of a Fourteenth Amendment violation cannot be sustained. The district court, contrary to this Court's well-established analysis for such Fourteenth Amendment violations, found a violation solely because the districts were not within plus or minus 5% of the ideal population:

> Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized that, under the Fourteenth Amendment, standard districting criteria, such as respect for city or county

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[19] Ohio Supreme Court Justice Douglas has suggested that this claim is barred by the doctrine of res judicata. *Voinovich v. Ferguson*, 63 Ohio St.3d at 209-10 (Douglas, J., concurring). The redistricting case before the Ohio Supreme Court, *Voinovich v. Ferguson*, *supra* specifically concerned whether the senate district was within Ohio Constitutional population requirements. The Ohio Supreme Court held that it was. Appellees Ferguson and Quilter, although parties to that proceeding, chose not to assert their Fourteenth Amendment claim, which claim was a compulsory counterclaim. Under the doctrine of res judicata, as dictated by Ohio law, they are now barred from litigating that issue in another court. *Bolles v. Toledo Trust Co.*, 136 Ohio St. 517, 520 (prior action bars relitigation of all claims which were *or could have been brought*), *cert. denied*, 311 U.S. 673 (1940); *Interstate Steel Erectors, Inc. v. H & L Wolff, Inc.*, 17 Ohio App.3d 173 (1984) (failure to assert compulsory counterclaim constitutes res judicata). Federal courts must give the same preclusive effect to state court judgments as would the courts of the state. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986) (citing 28 U.S.C. § 1738). As the Ohio Supreme Court would give preclusive effect to its decision, the district court was required to do so as well.

> boundaries, must give way to the equal population standard if there is an unavoidable conflict. Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 148a (N.D. Ohio March 19, 1992) (*per curiam*) (citations omitted).

The district court failed to conduct the analysis required by this Court in *Mahan v. Howell*, 410 U.S. 315 (1973), and *Connor v. Finch*, 431 U.S. 407 (1977). In those cases, this Court concluded that total deviations of less than 10% in state legislative districts were *prima facie* constitutionally permissible, while the state must justify total deviations greater than that amount. The drawing of district lines so as to respect political subdivision boundaries has been held to constitute sufficient justification for some deviation in excess of 10%. See *Mahan, supra; Brown v. Thompson*, 462 U.S. 835 (1983).

The district court in this case performed none of the required analysis, but merely invalidated the 1991 plan of apportionment on the basis of a total deviation in excess of 10%. Such an analysis would have revealed Ohio's longstanding policy to respect political subdivision boundaries where reasonably possible. The Appellants did so in this case with a resulting total deviation of only 13.81%, well within the range approved by this Court in *Mahan*. Accordingly, the decision of the court below that the Fourteenth Amendment has been violated must be reversed.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court to note probable jurisdiction, and to hear this appeal on an expedited basis.

DATED: April 8, 1992

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

---

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,
versus
GEORGE V. VOINOVICH, *et al.*,
Defendants.

OPINION AND ORDER

Decided and Filed January 31, 1992

Before: JONES, Circuit Judge, PECK, Senior Circuit Judge, and DOWD, District Judge.

PECK, Senior Circuit Judge, delivered the opinion of the court in which JONES, Circuit Judge, joined, DOWD, District Judge, dissented.

PECK, Senior Circuit Judge. This three-judge district court was convened to hear Plaintiffs' constitutional and statutory challenges to the 1991 Apportionment Plan for the Ohio General Assembly (the Plan). Plaintiff Barney Quilter, a state representative and designee of the Speaker of the Ohio House of Representatives, and Plaintiff Thomas Ferguson, Ohio's Auditor, were the Democratic members of the 1991 Apportionment Board (the Board). The remaining Plaintiffs are Democratic electors and state legislators, some of whom are members of a protected class under the Voting Rights Act. Plain-

tiffs allege that the Plan impermissibly uses race to draw districts and dilutes minority voting strength in violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the fourteenth and fifteenth amendments to the United States Constitution. Additionally, Plaintiffs assert a pendant state claim that the Plan violates Article XI the Ohio Constitution which provides specific apportionment guidelines.

Defendants George Voinovich, Governor of the State of Ohio, Robert Taft, II, Ohio's Secretary of State, and Stanley Aronoff, President of the Ohio Senate, were the Republican members of the 1991 Apportionment Board. Defendant James Tilling drafted the Plan. Defendants contend that the Voting Rights Act, as amended in 1982, and federal case law required that, wherever possible, they create majority-minority districts, *i.e.*, legislative districts in which members of a minority group comprise the majorty.

For reasons which more fully appear hereinafter, we conclude that the Voting Rights Act and federal precedent do not dictate such a *per se* requirement. While creation of such districts may be an appropriate remedy under certain circumstances, Defendants here failed to make the requisite findings which demonstrate a violation of the Voting Rights Act, thereby permiting such a remedy.

APPLICABLE LAW

In order to understand the rationale by which the Plan was developed, it is necessary to review § 2 of the Voting Rights Act, as amended, and *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991). In 1982, the Voting Rights Act was amended. The legislative history of the amendment stated that its purpose was "to prohibit any voting practice[] or procedure [that] results in discrimination" and "to make clear that proof of discriminatory intent is not required to establish a violation of Section 2." S. Rep. No. 417, 97th Cong., 2d Sess. 2 (1982).

Section 2 of the Voting Rights Act, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973(f)(2)], as provided in subsection (b).
>
> (b A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Thus, the statute does not focus on the purpose or motivation behind the challenged practice or procedure, but the *results* of such practice or procedure. A violation is to be determined by a review of the totality of the circumstances.

The following is a nonexhaustive list of factors relevant to a totality of the circumstances assessment that may be used to establish an unequal opportunity to participate in the political process and elect a candidate of choice:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process (footnote omitted);
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction (footnote omitted).

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982). Additional factors that could have probative value in establishing a violation are:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group (footnote omitted).

> whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous (footnote omitted).

Id. at 29.

The Senate Committee noted that 'there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* Whether a § 2 violation has occurred is "based on the totality of the circumstances and guided by those relevant factors in the particular case. . . ." *Id.* at 29 n.118. The ultimate "question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" *Id.* at 30.

One month before the Board published the Plan challenged here, the *Armour* court filed its decision. In *Armour*, the plaintiffs alleged that a voting district boundary in Mahoning County drawn under the 1981 apportionment plan which split a large, cohesive Black population between two districts deliberately and effectively diluted the minority vote in violation of § 2 of the Voting Rights Act and the fifteenth amendment. The *Armour* court conducted a "searching practical investigation of the past and present reality" in Mahoning County by applying the totality of the circumstances factors and concluded that the boundary was indeed violative of § 2 of the Voting Rights Act and the fifteenth amendment. Significantly, the Black population divided by the illegal boundary was not large enough to form the majority of a single-member district. Thus, the court in *Armour* recognized that a cohesive group of minority voters could *influence* an election even though they did not comprise a majority in the district. *Armour*, 775 F. Supp. 1052, 1059-60.

FACTUAL BACKGROUND

Under the Ohio Constitution, beginning in 1971 and every tenth year thereafter, a five-member apportionment board is to assemble and publish an apportionment plan for the General Assembly. Ohio Const. art. XI, § 1. In accordance with this provision, an apportionment plan was published and became effective in 1981, prior to the 1982 amendment of the Voting Rights Act. Tilling, as author of the 1991 Plan, testified that he tried "to make the necessary changes to bring this current apportionment plan into conformity with the 1982 amendments." (Tilling Dep., Vol. I, at 168). During the end of August 1991 and the beginning of September 1991, Tilling conducted fourteen public meetings throughout Ohio for the purpose of obtaining public comment and minority input on the 1991 Plan.

In his comments at these public hearings, Tilling repeatedly stated that his interpretation of the Voting Rights Act and related federal case law required the creation of a majority-minority district wherever possible. Joint Trial Exhibits, *passim*. For example, at the public hearing in Columbus, Ohio, on August 27, 1991, Tilling stated that to comply with United States Supreme Court guidelines, the Apportionment Board was "under a mandate that wherever a majority-minority district can be created, that must be done." Joint Trial Exhibits, Tab 2, at 12. Tilling also stated that the Board needed to "establish for the record the totality of the circumstances in each urban area" to comply with the Voting Rights Act and the recent decision in *Armour*, *supra*. (Joint Trial Exhibits, Tab 13, at 33). Black community leaders and other interested persons spoke at the public meetings. The Plan was adopted by the Republican majority on the Board on October 1, 1991, amended on October 3, and published on October 5. Plaintiffs Quilter and Ferguson dissented.

In this action, Plaintiffs allege that under the guise of protecting minority rights by creating majority-minority districts, Defendants have actually packed minorities into certain districts where minorities historically were able to elect representatives of choice with crossover votes. Plaintiffs contend that the packing results in wasting minority votes in the packed districts and diluting minority voting strength in surrounding areas where the "packed" voters could possibly influence elections. Specifically, Plaintiffs allege minority vote dilution resulting from the revision of nine districts which have been represented by either a minority legislator or a white legislator with a 90% to 100% voting record on bills related to minority issues.

With regard to the black legislators, each has been elected to between six and thirteen terms. For the elections between 1984 and 1990, each was elected with an average plurality ranging between 68.27% and 72.64%. Under the 1981 apportionment plan, the black population in their districts ranged from 38.5% to 53.19%. Under the 1991 Plan, the black population in each district was increased between 7.7% and 13.68%. Plaintiffs assert that these increases impermissibly pack black voters in districts where their votes are wasted because there exists substantial crossover voting which allows blacks to elect candidates of choice. Plaintiffs also allege that where these districts were revised, segments of the former district having small minority populations were combined with other districts resulting in the fragmentation and dilution of minority voting strength. Similarly, Plaintiffs allege that the districts represented by the white legislators with responsive voting records on black issues were divided so that portions of the black population were packed into districts with a high percentage of black population or fragmented into districts with such a small percentage of black population that the minority voting strength would be diminished. As justification for these configurations, Defendants assert that the Voting Rights

Act and federal case law mandate the drawing of majority-minority districts. We cannot agree.

ANALYSIS

A. Justification for majority-minority districts

The language of § 2 of the Voting Rights Act contains no requirement for majority-minority districts. Rather it prohibits *any* "standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." It is directed against certain *results*, regardless of how they are produced. Thus, where the creation of majority-minority districts wastes minority votes by packing and dilutes minority influence by fragmenting, the result is an "abridgement of the right . . . to vote on account of race or color" which violates the Voting Rights Act. The United States Supreme Court has recognized this principle:

> Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority. (Citations omitted).

Thornburg v. Gingles, 478 U.S. 30, 46 n. 11 (1986).

Thus, we can find no *per se* requirement for the creation of majority-minority districts in § 2 of the Voting Rights Act.

Tilling also makes reference to *Gingles*, *supra*, in justifying his configuration of districts. In *Gingles*, the United States Supreme Court considered a challenge under § 2 of the Voting Rights Act to North Carolina's multimember districting scheme. The Court set forth three preconditions to a § 2 challenge alleging that multimember districts impair minority voters' ability to elect representatives of their choice:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51 (emphasis in original) (footnotes and citations omitted).

Apparently, Tilling read the first precondition to require the creation of majority-minority districts wherever possible. However, the Supreme Court in *Gingles* limited these preconditions to challenges to multimember districts:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability *to elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim

> that multimember districts operate to dilute the vote of geographically cohesive minority groups, that are large enough to constitute majorities in single-member districts and that are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Id. at 46 n. 12.

Thus, *Gingles*' preconditions are not applicable to the apportionment of single-member districts and claims of dilution of minority influence districts at issue here. *Accord*, *Armour*, 775 F. Supp. at 1052. Therefore, we can find nothing in *Gingles* which establishes a *per se* requirement for the creation of majority-minority districts.

Finally, Defendants suggest that *Armour*, *supra*, mandates the creation of majority-minority districts. It is true that the court in *Armour* concluded that the division of a cohesive concentration of Black voters between two districts in Mahoning County was violative of § 2 of the Voting Rights Act and the fifteenth amendment. These determinations were made after the court conducted a detailed examination of the totality of the circumstances factors outlined in the legislative history with regard to Mahoning County and Youngstown. While the aggregation of Black voters into one district is an appropriate remedy under certain circumstances, *Armour* does not stand for the proposition that persons responsible for apportionment should create majority-minority districts wherever possible. Thus, we conclude that nothing in § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour*, *supra*, mandates the drawing of majority-minority districts wherever there is a concentration of Black voters.

B. Inadequacy of Defendants' totality of circumstances analysis

In addition to Tilling's contention that federal statute and case law mandated the creation of majority-minority districts, he justified the Plan by stating that revised districts were necessary "to bring [the 1981] apportionment plan into conformity with the 1982 amendments." Tilling Dep., Vol. 1, at 168. Thus, in essence, Tilling is asserting that the majority-minority configuration was necessary to remedy violations of the Voting Rights Act under the 1981 plan. However, violations of the Voting Rights Act are not to be assumed. The finding of a violation requires an in-depth analysis of the totality of the circumstances in the locality at issue. S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982); *Armour*, 775 F. Supp. at 1053 (our inquiry does not focus on the black experience in the entire state but rather on the political and social reality local to the Mahoning Valley). Although Tilling stated that one of the reasons for the public hearings was to "establish for the record the totality of the circumstances in each urban area . . ." Joint Trial Exhibits, Tab 13, at 33, we find the information in the record grossly inadequate in this regard.

Key determinations in a totality of the circumstances analysis are whether racially polarized voting exists and the closely related issue of the extent to which minority candidates are elected in the jurisdiction. *Gingles*, 478 U.S. at 55. The Supreme Court in *Gingles* provided guidance on determining the whether racially polarized voting[1] is present in a case. The Court noted that the district court relied principally on expert statistical evidence derived through extreme case analysis and bivariate ecological regression analysis on data from three different election years in the challenged districts. *Id.* at 52-53.

[1] The Supreme Court used the terms "racially polarized voting" and "racial bloc voting" interchangeably in *Gingles*. 478 U.S. at 52, n. 18. The terms are also used interchangeably here.

These methods are standard in the literature for the analysis of racially polarized voting. *Id.* at 53, n. 20. The degree of bloc voting which constitutes the threshold of legal significance varies from district to district. *Id.* at 55-56. However, a showing that a significant number of minority group members vote for the same candidates can establish minority bloc voting within the context of § 2. *Id.* at 56. Generally, white voting patterns that normally will defeat the combined strength of minority support and white "crossover" votes is legally significant white bloc voting. *Id.*

In the present case, Tilling "concluded that there was significant racial bloc voting throughout the State of Ohio. . . ." Tilling Dep., Def. Exh. 96; at 93. However, Tilling arrived at this conclusion without the benefit of regression analysis. *Id* at 92. Instead, Tilling examined the votes for the minority representatives to the General Assembly in past elections to try to ascertain racial patterns of voting. Tilling Dep., Vol. I, at 37-39. Tilling admits that he did the analysis using 1990 census data which does not correspond directly to the 1981 districts. *Id.* at 38. Tilling did not reduce his calculations or conclusions to writing. *Id.* at 39. Tilling also examined the results of the primary in which Jesse Jackson ran. Tilling Dep., Vol. II, at 6. Again, he did not subject the data to any statistical analysis. *Id.* at 9.

Tilling further contended that racial bloc voting existed in the districts in which black legislators were being elected with white crossover votes from districts with less than a majority of black voters. Tilling Dep., Vol. I, at 39. When asked specifically if the racial bloc voting in these districts was legally significant, Tilling could not give an unequivocal answer, stating merely that "given the opportunity there is a much higher percentage of black vote for black candidates than white vote for black candidates." *Id.* at 40-41. However, Tilling acknowledged that blacks were elected from districts with as

low as 35% black population. *Id.* at 177-78. Ultimately, Tilling increased the black voters in these districts despite the successful election of black legislators with substantial crossover white vote.

It is disturbing that Tilling based his conclusions that there was racial bloc voting and subsequent revisions in the apportionment of voters on such a casual analysis of voting returns. He did not subject his data to statistical analysis or even memorialize his calculations and "findings" in writing. Given the guidance of the Supreme Court in *Gingles* with regard to legally significant racially polarized voting, we conclude that Tilling's analysis does not rise to the level of proof of racially polarized voting.

Another relevant factor is whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the minority community. However, Tilling stated that he did not examine the voting record of any single respresentative to determine his responsiveness to the minority community. *Id.* at 185. Tilling's information on this factor involved his review of legislators' voting records in preparation for previous Senate campaigns. *Id.* at 179-181. He observed that the information was "part of my mental equipment as I began this process." *Id.* at 180-81.

Review of social and historical factors are also appropriate under a totality of the circumstances review. However, Tilling admitted that he did no studies of the communities at issue except to hold the public hearings. Tilling Dep., Vol. II, at 39. While a few relevant items can be sifted from the voluminous transcripts of the public meetings, there is a paucity of information on these factors in the record. Of the information available, much is anecdotal and seems to be culled from Tilling's personal experience rather than from community sources. For example, when deposed on factors he took into account in his totality of the circumstances analysis, Tilling stated that "in the course of my years in the Senate I have had

occasion to talk to many of the minority representatives about various practices that have influenced their ability to fully participate in the process. . . ." Tilling Deposition, Def. Exh. 96, at 97-98. With respect to discrimination in education, Tilling stated that he had spent a year in the late 70's on the Ohio General Assembly's Joint Select Committee on School Desegregation and noted that schools in several of the urban areas in Ohio are under desegregation orders. *Id.* at 97. Tilling also testified that he was aware of the differences in employment figures for minorities and whites in Ohio. *Id.* While Tilling's input on some of these issues could be useful in a totality of the circumstances review, we find that it, even in combination with a series of public meeting compressed into a two and a half week period, falls far short of the "searching practical evaluation of past and present reality" mandated by the legislative history.

Accordingly, we find that no adequate totality of the circumstances analysis was performed by the Board. In the absence of such an analysis, there can be no reliable finding of a violation. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.

CONCLUSION

For the foregoing reasons, we conclude that there is no legal mandate or finding of a Voting Rights Act violation to justify Defendants' creation of majority-minority districts wherever possible in the 1991 Apportionment Plan. Accordingly, the Board is ORDERED to reconsider the Plan. Unless it can show justification under the totality of the circumstances test for the present configuration, the Board must submit a revised plan to this

court within 20 days of the date of this order. In the event that a revised plan is not received by this court within the time limit, further action will be taken by this court *sua sponte*.

Because our analysis under the Voting Rights Act requires the Plan to be revised, we decline to address Plaintiffs' claims under the United States Constitution at this time. This is consistent with the judicial preference for deciding cases without reference to questions arising under the Federal Constitution whenever possible. *Hagans v. Lavine*, 415 U.S. 528, 546 (1974) (citing *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 193 (1909)).

With regard to Plaintiffs' claims under the Ohio Constitution, we note that these claims are before the Ohio Supreme Court in the case of *Ferguson v. Voinovich*, No. 91-1882. While this court is not required to abstain from these issues, *Davis v. Mann*, 377 U.S. 678, 690 (1964), where parallel litigation is instituted in the state and federal courts, it is appropriate for the federal courts to deal with the federal issues and leave the state issues to the state court. We do note, however, that the Board majority claims adherence to the alleged federal mandate to create majority-minority districts wherever possible. Given that we now hold that there is no such mandate, we remove this as a possible defense in any subsequent or concurrent state proceedings.[2]

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[2] The exigencies of the situation, which include satisfying deadlines, have required counsel for the parties to formulate and present their positions with commendable speed, and have similarly imposed upon this panel a mandate to record the conclusions reached as rapidly as possible. The opportunity of offering an analysis in depth of the thoughtful dissent (which, in fact, we have only seen in outline form) not being available, we refrain from offering a detailed reaction, observing simply that in our view such an analysis only becomes appropriate after an apoprtionment plan has been shown

to have been prepared according to law. The present record is devoid of such a showing.

Some response might, however, be helpful to the parties. First, we must caution against accepting some of the characterizations of the majority opinion by the dissent. For example, it observes, "My colleagues have ruled that the 1991 reapportionment of Ohio for the purposes of electing the Ohio General Assembly violates § 2 of the Voting Rights Act because the majority members of the apportionment created additional majority-minority voting districts in Ohio . . . ." The dissent goes on to state, "Presumably, the Court holds that increasing the minority population in a district where a minority group is already able to elect a minority representative is *per se* packing and wasting minority votes." The dissent further observes that "the majority apparently holds that the districts must be drawn in such a way that the black vote is *maximized*." We made no such holdings. The thrust of the opinion is not to outlaw majority-minority districts nor to create "a favored race for voting purposes," as the dissent suggests. Rather, the guiding lights are that there is no legal mandate under § 2 of the Voting Rights Act, *Gingles*, *supra*, or *Armour*, *supra*, to create majority-minority districts wherever possible. Furthermore, in the absence of a reliable finding of a violation of the Voting Rights Act, it cannot be used as justification for the wholesale creation of majority-minority districts. This highlights the divergent directions from which the majority opinion and dissent proceed. The dissent focuses only on the untested end result, whereas the majorty opinion recognizes the vital importance of the process and the pitfalls which arise from a *per se* application of majority-minority districting, *i.e.*, minority vote dilution can result from the concentration of minorities in districts.

Proceeding from their respective approaches, the narrow holding of the majority opinion requires the resubmission of a plan properly premised, while the dissent would put this court in the position of a super-apportionment board—a status which on the basis of abundant authority we decline to occupy. Unlike the dissent, we purposely have not compared and contrasted the plan submitted by the Plaintiffs to the plan adopted by the majority of the Board. The function of this court at this stage of the proceedings is not to choose between two plans, but to measure the plan as adopted against federal law. As stated above, federal law cannot serve as the justification for the present plan. Unless, the Board can show such justification, it must proceed to develop a revised plan which complies with federal and state constitutional law.

DOWD, J., dissenting:

This case brings together a number of developments in Ohio political life. They include Ohio's attempt by way of constitutional provisions to comply with the one man-one vote mandate of *Baker v. Carr*, 369 U.S. 186 (1962), the ten year requirement [1] to reapportion [2] the Ohio General Assembly, a change in the demographics in Ohio, including a southward and westward shift in population, the change in the political control of the Ohio Apportionment Board from the Democratic Party to the Republican Party, the impact of the Voting Rights Act as amended in 1982, 42 U.S.C. § 1973, the recognition by both the Republican and Democratic members of the Apportionment Board of the desirability of creating more majority-minority legislative districts in Ohio, and the decision in the *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) case.

This case, filed on November 1, 1991, required the creation of a three judge panel and, in the context of the remedy sought by the Plaintiffs, prompt action in view of the filing deadline of February 20, 1992 for candidates seeking election to the Ohio General Assembly in the general election in November of 1992.[3]

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[1] Ohio Constitution, Article XI, § 1.

[2] The words "apportion" and "reapportion" are used interchangeably in the case law. For purposes of my dissent I have used the word apportion as it is used in the Ohio Constitution even though this case involves the reapportionment of the State of Ohio.

[3] Ohio conducts a primary election in May in the two major political parties and candidates wishing to run as either the Democratic or Republican candidate must declare by February 20, 1992. Candidates wishing to run as independents face more stringent requirements in terms of the number of persons who must sign the candidacy petition, but the petitions themselves need not be filed until after the May primary has been conducted.

The three judge panel, mindful of the time constraints, has endeavored to expedite the fact finding process and render a decision so as to avoid uncertainty about the mechanics of the 1992 election for the Ohio General Assembly.[4]

The central feature in this highly charged political controversy that typically accompanies the apportionment of a state for the purposes of electing the state's legislative body is the question of whether the apportionment process should include recognition and consideration of the provisions of Section 2 of the Voting Rights Act. The Defendants answer that question in the affirmative and declare that the complicated procedure of apportionment of necessity included consideration of how to structure the 99 house districts in the urban counties of Ohio where the largest minority populations are located. The position of the Plaintiffs which include the two Democratic members of the apportionment board is less apparent. The Plaintiffs contend that the Apportionment Board did not make any fact findings that support its decision to create additional majority-minority districts and claim the creation of the additional majority-minority districts was contrary to law in the absence of such fact findings in the context of the "totality of the circumstances" test set forth in the legislative history that accompanied the adoption of the 1982 amendment to the Voting Rights Act and which gained additional recognition in the plurality opinion in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The Plaintiffs additionally claim the number of black voters was increased in a number of districts, contrary to law because the district was already represented by a black incumbent and thus the addition of the black voters constituted "packing" or

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[4] The Court granted the parties in this case three hours apiece to present their testimony. That procedure was completed on December 17, 1991. Thereafter, counsel filed proposed fact findings on December 30, 1991 and briefs on the merits on January 6, 1992.

"wasting" of those black voters. The Plaintiffs also claim, based on a study done with reference to the 1990 Ohio elections, that the number of "influence" districts have been decreased and that such a decrease involves a violation of the Voting Rights Act. In sum the Plaintiffs-Democrats contend that the Defendants-Republicans violated the Voting Rights Act by creating additional majority-minority voting districts in Ohio and also violated the Voting Rights Act by decreasing the number of "influence" districts.

Additionally, Plaintiffs claim that the 1991 apportionment plan violates the due process provisions of the fourteenth amendment because the 1991 plan constituted partisan gerrymandering. The partisan gerrymandering claim fails for two reasons. First, I find an absence of proof. More importantly, in the absence of an actual election conducted under the 1991 plan, the issue of partisan gerrymandering is premature. *Davis v. Bandamer*, 478 U.S. 109 (1986).

The Plaintiffs also allege that the Defendants intentionally violated the fifteenth amendment. My colleagues have not addressed the constitutional claims because of the determination that the 1991 apportionment plan violates the Voting Rights Act. Again, I find a total absence of proof of an intentional violation of the fifteenth amendment.

My colleagues have ruled that the 1991 apportionment of Ohio for the purposes of electing the Ohio General Assembly violates § 2 of the Voting Rights Act because the majority members of the apportionment board created additional majority-minority voting districts in Ohio, and have ordered the five members of the apportionment board to revise the plan within 20 days without giving any accurate guidance as to how that process is to be accomplished within the structures of the Ohio constitution or for that matter within the mandates of the Voting Rights Act.

The majority opinion provides a very limited factual background critical to a proper analysis of this case. I am of the opinion that in evaluating an apportionment plan, the district court should be careful to make "detailed findings of facts . . ." both to insure a proper analysis of the plan at the district court level and to assist the Supreme Court should appellate review become necessary. *Westwego Citizens for a Better Government v. Westwego*, 872 F.2d 1201, (5th Cir. 1989). If one of my fellow judges on this panel had agreed with my position and I had the opportunity to write the Court's opinion, I would have made the fact findings that are attached as Appendix 2 to this dissent. From those fact findings I have distilled a summary of major fact findings which are hereafter incorporated in the body of this dissent.[5]

Article XI of the Ohio Constitution provides a detailed plan for the decennial apportionment of the Ohio General Assembly. The detailed plan calls for the creation of ninety nine separate single member districts for the Ohio House of Representatives and thirty three single member seats in the Ohio Senate. Appendix 1 is a study of the eighty eight Ohio counties setting forth the number of lower house districts allocated on a county by county basis with an indication of the total population and black population of the eighty eight counties.

Bernard Grofman, recognized as a national expert[6] on apportionment issues as they relate to minority interests, has declared in a recent publication, Bernard Grofman, *Voting Rights, Voting Wrongs; The Legacy of Baker v. Carr*, 1990 TWENTIETH CENTURY F. PAPER. 31:

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[5] A summary of these fidings can be found later in the dissent.

[6] Writing for the Court in *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986), Justice Brennan indicated that he "relied principally on statistical evidence presented by . . . Dr. Bernard Grofman." Justice Brennan also cited numerous articles written by Dr. Grofman on the issue of apportionment. *Id.* at 47, 53.

> One approach to eliminating or reducing gerrymandering is through statutory or state constitutional provisions that strictly implement formal criteria such as compactness, equal population, and maintenance of the integrity of political subunits.

My study of the 1991 apportionment process for Ohio in the context of the Ohio Constitutional provisions indicates that the Ohio Constitution and the process for the 1991 apportionment is a mirror of Grofman's recommended approach.

SUMMARY OF MAJOR FACT FINDINGS

In the interest of brevity and convenience, I have highlighted the fact findings that I submit are most critical to a proper analysis of this case.

1. Article XI of the Ohio Constitution controls the apportionment process for the legislative body for Ohio, the General Assembly, and mandates 99 single member districts for the House of Representatives and a 33 member Senate comprised of three contiguous House Districts.

2. The apportionment process takes place in Ohio every ten years in the year in the decade ending in the number 1 and in reliance on the most recent federal decennial census information. The 1991 apportionment plan for the Ohio General Assembly relies on the 1990 census data.

3. The Ohio Constitution requires that the apportionment process be accomplished on a county by county basis and requires compact districts. Ohio has 88 counties. The first requirement in the apportionment process is to determine the ideal number for a district by dividing the entire state population by 99 and for 1991 this process produced an ideal number of 109,567. Next, single member county districts are mandated in the event the county's total population is with 5% of the ideal number. Four Ohio counties, Warren, Wood, Allen and Columbiana, fell within that computation for 1991. The apportionment board may also create single member dis-

tricts for counties with a total population that is within 10% of the ideal number. The 1991 plan includes in that latter category an additional three counties, Fairfield, Wayne and Ashtabula. Next, the apportionment board is directed to create districts beginning with the most populous counties with the mandate that where a county has population in excess of the number needed for a single member district, that only one district within the county that is entitled to more than one district may spill over ino an adjoining county or counties. By way of example, Cuyahoga County, the most populous county, is entitled to 12.88 districts. Twelve of the districts must be contained wholly within Cuyahoga County and the 13th district will, of necessity, "spillover" into an adjoining county. Twenty six Ohio counties are entitled to at least one district within the county. The remaining 62 counties have a population less than 90% of the ideal number for a district and therefore must be combined with other counties to create a house district.[7]

4. The apportioning process for the Ohio General Assembly is done by two persons appointed from the Ohio General Assembly with each of the two major political parties represented. The remaining three are the elected governor, auditor of state, and secretary of state. In 1971 and 1981, the apportioning process was controlled by a majority from the Democratic party and in 1991 by a majority from the Republican party.

5. In addition to the Ohio constitutional provisions that control apportionment, Section 2 of the Voting Rights Act as amended in 1982 and recently interpreted in the *Armour* case that struck down the 1981 apportionment as it related to Mahoning County, was considered by the members of the apportioning board in 1991.

6. The black minority population in Ohio is predominantly located in its six major urban counties of Cuyahoga

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[7] *See* Appendix 1.

(24.9%), Franklin (15.9%), Hamilton (10.9%), Montgomery (17.7%), Summit (11.9%) and Lucas (14.8%). Those six counties account for approximately forty four of the ninety nine house districts and are presently represented by 11 minority representatives even though the total black population of the six counties (according to 1990 census figures) is only 19.1% of the total population of the six counties, i.e., 915,628 of a total population of 4,790,965.

As indicated in the 1990 census, the total population of Ohio is in excess of 10 million people, and with only a modest change from the 1980 census. Ohio experienced a net gain in population of approximately 50,000 people. However, there were significant population shifts within the state. Specifically, there occurred a substantial shift in population from the Northeast quadrant of the state to the Central and Southwest portions of the state, particularly to Franklin, Delaware, Union and Madison counties. There also occurred a population shift from Cincinnati and Hamilton County to Butler, Clermont and Warren counties. Cuyahoga County lost one entire house district in population (109,000 people) while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous county in the state. There were also significant population shifts from the inner cities to the suburbs.[8]

7. As a result of major population shifts within counties and from the inner city to the suburbs, the majority of the 1981 configured districts in the six major urban counties had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution.[9]

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[8] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 61-63.

[9] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 79-80.

8. By way of summary, the 1991 Apportionment Plan creates four (4) majority-minority districts in Cuyahoga County with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with a black population of 74.80%, 90.05%, and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%.[10]

The 1991 Apportionment Plan also creates a strong influence district to Cuyahoga County of 40.61% compared to an influence district of only 26.46% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.[11]

The 1991 Apportionment Plan has one (1) majority-minority district in Franklin County at 50.30% black voting age population where none existed in the 1980 apportionment. The 1991 Apportionment Plan also has a strong influence district at 44.31%. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs' Ferguson and Quilter also has one (1) majority-minority district at 50.60% black voting age population and one influence district at 46.40% Significantly, part of the rationale in the 1991 Apportionment Plan for increasing relative black percentages in Franklin County house districts from the 1981 plan was to create a Senate influence district in Franklin County.[12]

The 1991 Apportionment Plan creates two (2) majority-minority districts in Hamilton County where only one existed in the 1981 apportionment. The majority-minority districts in the 1991 Apportionment Plan have

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[10] *See* Defendants' Exhibit 77.

[11] Defendants' Exhibit 77.

[12] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 103-104.

black voting age populations of 52.60% and 56.83%. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also reflects one (1) majority-minority district at 57.91%. The 1991 Apportionment Plan also reflects an influence district of 21.58% compared to 19.55% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

The 1991 Apportionment Plan reflects one (1) majority-minority district in Montgomery County, where none existed in the 1981 apportionment. The 1991 Apportionment Plan has a district with a black voting age population of 50.70% and an influence district at 29.23%. By way of comparison, the plan presented by Plaintiffs Ferguson and Quilter has no majority-minority districts and two influence districts at 36.20% and 45.26%. Plaintiffs challenge no districts in Montgomery County.

The 1991 Apportionment Plan reflects a slight increase in black population in House District 42, in Summit County, currently represented by minority incumbent Representative Sykes. The increase is from 35.40% to 43.26% black population. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also increases the black population in Representative Sykes' district from 35.40% to 47.20%. Plaintiffs challenge no districts in Summit County.

The 1991 Apportionment Plan reflects an increase in black population in House District 45, in Lucas County, which is comparable to the district currently represented by minority incumbent Representative Casey Jones. The black voting age population in Jones' district was increased to 47.65% compared to 44.98% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. The black populations in House Districts 45 and 47 in the 1991 Apportionment Plan are substantially similar to the 1991 Apportionment Plan proposed by Plaintiffs Ferguson and Quilter.

In Stark County, there is not sufficient black population to form a majority-minority district.

The districts in Mahoning County are configured pursuant to the order of the Federal District Court in *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991).

Overall, there are eight (8) majority-minority districts in the 1991 Apportionment Plan compared to only four (4) in the 1981 apportionment and six (6) in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

In the 1991 Apportionment Plan, there are twenty (20) districts with over 10% black voting age population, which is the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

9. In drafting the 1991 Plan, Mr. Tilling worked closely with the leaders of various minority groups in Ohio. Further, minority groups had substantial input in the creation of the final plan that was submitted to the state legislature.

10. Proposed apportionment plans were submitted by numerous minority special interest groups. Among those submitted, were the plans from Black Elected Democrats of Ohio (BEDO) and the Ohio Conference of Branches of the NAACP.

On September 30, 1991, the Apportionment Board met to hear testimony from the various proponents of the proposed plans.[13]

On October 1, 1991, the Apportionment Board met again to consider adoption of a final plan of apportionment. The meeting was recessed from time to time to permit discussions among representatives of BEDO and

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[13] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 36-37.

the NAACP and Mr. Tilling to attempt to reach a concensus concerning minority districts.[14]

These discussions were initiated by Mr. Tilling after representatives of BEDO and the NAACP failed to reach a consensus regarding minority districts. Mr. Tilling contacted Congressman Louis Stokes to attempt to bring the minority groups together. Mr. Tilling initiated these discussions since he knew that minority voting issues would be the focal point of the apportionment process.[15]

11. During the public hearing conducted on October 1, 1991, BEDO and the NAACP reached a consensus regarding the establishment of minority districts in Cuyahoga County in the final 1991 apportionment plan. The NAACP accepted BEDO's proposal for Cuyahoga County, establishing four majority-minority districts and one influence district in Cleveland. The NAACP's original plan established five majority-minority districts in Cuyahoga County. The plan orginally submitted by the Board also called for five majority-minority districts in Cuyahoga County.[16]

On October 1, 1991, BEDO offered the consensus position with regard to the districts in Cuyahoga County as an amendment to the BEDO plan (referred to herein as the "BEDO Amendment"). The BEDO Amendment was also offered as an amendment to the plan proposed by the majority of persons responsible for apportionment.[17] The amendment was accepted by the Apportion-

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[14] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38-40.

[15] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38, 39, 42.

[16] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 43.

[17] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 41.

ment Board and incorporated in the final 1991 Apportionment Plan.[18]

12. At the meeting of October 1, 1991, Dana Mattison [19] and Senator Jeff Johnson, a minority Senator from Cuyahoga County, endorsed the BEDO Amendment creating four majority-minority districts. Floyd Johnson, on behalf of the NAACP, endorsed the entire 1991 Apportionment Plan.[20]

The BEDO Amendment was endorsed by William Mallory, President of BEDO and Congressman Stokes.[21]

The Ohio Conference of Branches of the NAACP endorsed the 1991 Apportionment Plan in its entirety.[22]

13. The 1981 apportionment plan for Ohio created 24 districts with a ten percent (10%) or more minority voters. Two of those districts were in Mahoning County and the *Armour* decision required that the two districts be realigned to place all minority voters in one of the two districts. The 1981 apoprtionment plan also created as a part of the 24 districts, four majority-minority districts, three in Cuyahoga County with a percentage of blacks as high as 94.67% and one in Hamilton County with a percentage of black voters fixed at 53.2%. The 1991 apportionment plan created eight majority-minority districts

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[18] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 44.

[19] Dana Mattison is the Executive Director of BEDO. Deposition of Dana Mattison, Defendant's Exhibit 82, sub exhibit C; p. 14.

[20] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 40; Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 83-89; Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 58.

[21] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 89, 90, 91.

[22] Deposiiton of Floyd Johnson, Defendants' Exhibit 97, pp. —.

and the number of districts with at least 10% minority voting population is 20. In sum, the 1991 apportionment plan, in comparison to the 1981 plan, has increased the number of majority-minority districts by four and reduced the number of districts with 10% or more black voters by four. *See* Appendix 1.

History of Apportionment Law

A. *Introduction*

In reviewing an apportionment plan developed by a legislature, a district court is guided by a number of constraints. First, the district court must only determine whether that plan is acceptable under the prevailing law, and not whether another plan would be more advantageous to the parties at interest. *Reynolds v. Simms*, 377 U.S. 533 (1964). Second, deference is to be extended to a apportionment plan advanced by the legislature. *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Texas 1982). It is with these considerations in mind that I evaluate the Plaintiffs' case.

B. *One Man One Vote*

The cases that first spoke to the requirements of apportioned voting districts focused on the ideal that each citizen should have an equal voice in his or her government. The way in which most citizens are heard in their government is through their vote on election day. Thus, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that each citizen's vote must carry the same weight in determining the outcome of a political election. The holding in *Baker* has come to be known as the "one man, one vote" rule, and has been followed ever since. As the Court in *Gaffney v. Cummings*, 412 U.S. 735, 741 (1973) noted:

> 'The requirement of Art. I § 2 of the Constitution, that representatives be chosen 'by the People of the several states,' mandates that one man's vote in a

> congressional election is to be worth as much as another's.'

(*quoting Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

C. *Voting Rights Act § 2*

In order to give effect to the "one man one vote" principle, Congress enacted the Voting Rights Act. 42 U.S.C. § 1973. In 1982, one year after the Democratic party controlled 1981 Apportionment Plan was adopted, § 2 was amended to eliminate the requirement of evidence of invidious, intentional discrimination in order to prove a voting Rights Act violation. In *Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held that disproportionate effect, alone, was insufficient to prove unlawful vote dilution. In response to cases such as *Mobile*, Congress passed in 1982, an amendment to § 2 of the Voting Rights Act that removed the requirement of invidious, intentional discrimination. *Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). As my colleagues point out, the focus now is on the *results* of the apportionment plan.

In evaluating the results of the plan, the court must take into account not only the deviations from the acceptable norm for population distribution, but also the extent of the deviation. Judicial apportionment plans have been held to very high standards, finding that even minor deviations violate the Voting Rights Act. Legislative apportionment plans have been afforded more leeway. Generally, legislative apportionment is guided by the "under 10% deviation" rule, finding that population deviations from the ideal norm that are less than 10% are *de minimis*. *Connor v. Finch*, 431 U.S. 407 (1977); and *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151 (5th Cir. 1981). *See eg. Gaffney v. Cummings*, 412 U.S. 735 (1973) (7.83% deviation from population norm was acceptable); and *White v. Regester*, 412 U.S. 755 (1973) (9.9% deviation acceptable).

ANALYSIS

Voting Rights Act

The majority begins its analysis of the case by noting that the Plaintiffs have alleged that the 1991 Plan violates the Voting Rights Act by impermissibly considering race in the drawing of district lines, serving to dilute the minority vote in the process. Before focusing on the 1991 Plan, however, the majority turns its attention to the merits of the 1981 Plan.[23]

The majority opinion argues that the 1991 Apportionment Plan must be rejected because the majority board, and namely Mr. Tilling, did not prove that the 1981 Apportionment Plan violated the Voting Rights Act. Specifically, the majority declares that under the totality of the circumstances test, it was not demonstrated that the 1981 plan violated the Voting Rights Act.[24] The majority reasons that absent such a showing, the majority board was not entitled to apportion the state.

The majority opinion appears to declare that the Voting Rights Act requires that there be an established violation before an apportionment board is entitled to apportion a district with a significant black population. This argument places the cart before the horse because the totality of the circumstances test, derived from the Voting Rights Act, is a tool that is to be utilized by the district court in evaluating the *plan before it*, and not as a prerequisite to redistricting.

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[23] My colleagues do address the "process" used by the majority board in arriving at the 1991 plan. A criticism of the "process analysis" will follow.

[24] The majority's conclusion that the 1991 Reapportionment Board was not entitled to reapportion the state is especially remarkable when one considers the fact that one district in Cuyahoga County contained a black population in excess of 94%. Such a figure must be considered packing under any judicial or legislative standard.

In *Reynolds v. Sims*, tne court held that the court's purpose in apportionment cases is not to determine which plan would be most appropriate in terms of fair and equal redistricting, but rather whether the plan before it violates the Voting Rights Act. Since I do not believe that the 1991 Plan violates the Voting Rights Act, I am of the view that it should be implemented.

While the majority opinion does not directly evaluate the 1991 Plan, it does criticize the process used by the majority board in developing the 1991 Plan. The majority opinion claims that Mr. Tilling's recommendation to create majority-minority districts whenever possible was inappropriate and not mandated by the Voting Rights Act. In my view, a § 2 of the Voting Rights Act as amended in 1982 and as interpreted by *Gingles* and *Armour* sends an unambiguous signal that a apportioning process must consider the impact of the apportioning on the minority rights of the voting persons. The majority opinion is ambivalent when one considers the fact that the Plaintiffs Ferguson and Quilter advanced their plan for apportionment which created an additional two majority-minority districts as opposed to the additional four such districts created by the adopted plan.

Rather than focus on the process used by the majority in arriving at the 1991 Plan, I submit that the Court should be concentrating on the result. It is only when the creation of majority-minority districts serves to dilute the minority vote that the Voting Rights Act is violated. The facts do not support the majority's conclusion that the 1991 Plan violates the Voting Rights Act.

The majority's determination that the Defendant members of the majority board have been unable to demonstrate that the Voting Rights Act mandates the redistricting found in the 1991 Plan omits several important observations. The Court completely ignores the fact that there were substantial population shifts in the state of Ohio since 1981. Based on the total population as calcu-

lated by the 1990 census, the ideal district population was 109, 567, and the allowed range was between 104,089 and 115,045. Twenty seven of the forty four districts in the six large urban counties, as defined by the 1981 Apportionment Plan, did not fall within the 5% deviation specified in the Ohio Constitution.[25] Specifically, nine districts in Cuyahoga County, seven districts in Hamilton County, six districts in Franklin County, three districts in Montgomery County, and two districts in Lucas County, had to be reconfigured because of the population shifts subsequent to the 1981 apportionment.

An apportionment board has an obligation to apportion when the districts do not meet the population requirements based on the total population of the state divided by the number of districts designated in the state's constitution. *Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). Left uncorrected, population shifts can, and I believe would in this case, result in a situation where the vote of one individual in one part of the state is of unequal weight as the vote of another individual located elsewhere in the state. That is why in *Garza*, the court held that the legislature has a *duty* to apportion when substantial population shifts occur in order to avoid a Voting Rights Act violation, and that is why I believe that apportionment on a grand scale was warranted and, indeed, necessary in this instance.

The majority is also critical of the fact finding process engaged in by Mr. Tilling. Specifically, the majority takes issue with Mr. Tilling's determination that racial bloc voting existed under the 1981 Plan. The majority indicates that Mr. Tilling did not engage in bivariate ecological regression analysis. Again, I respectfully submit that it was not the duty of the majority board to find racial bloc voting in order to justify the 1991 Plan.

The majority also discounted Mr. Tilling's findings of lack of responsiveness to the black community. The ma-

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[25] *See* Ohio Constitution, Article XI, § 10(A).

jority claims that his evidence is mostly "anecdotal . . . rather than from community sources." The record indicates otherwise. Mr. Tilling met with the leaders of every major minority group in the state of Ohio. He held public hearings inviting comments and criticisms from these groups, and accepted proposed plans from the various groups. Further, the record supports the conclusion that the 1991 Plan was largely the result of the collaboration of several minority groups working with the majority board.

In one of its few fact findings, the majority notes that in nine unspecified districts with either minority legislators or white legislators with a 90% to 100% voting record on bills related to minority issues, the 1991 plan increases the black population in each district. The Court observes that under the 1981 Plan the black population in these districts ranged from 38.5% to 53.19%, and that under the 1991 Plan the black population in each district was increased between 7.7% and 13.68%. Presumably, the Court holds that increasing the minority population in a district where a minority group is already able to elect a minority representative is *per se* packing and wasting minority votes.

Initially, such an argument ignores the fact that there were substantial population shifts in eleven districts represented by black legislators. Moreover, the black population in the six major urban counties has increased by 7.3%, while the white population has decreased by 1.67%. As Appendix 1 to this opinion demonstrates, the minority population in Cuyahoga County increased by 9,182, the minority population in Franklin County increased by 21,824, Hamilton County experienced a 15,151 increase, and Montgomery County noticed a 2,112 increase. Only Summit and Lucas County experienced a decrease in minority population. The additional black voters had to be placed in some district. Principles of geographical compactness dictate their placement, thus leading to an

overall increase in the black population in the districts in question.[26]

By arguing that the 1991 Plan is invalid because it increased the black population in districts where blacks were already able to effectively elect candidates of their choice, the majority apparently holds that the districts must be drawn in such a way that the black vote is *maximized*. Putting concerns of geographical compactness aside for the moment, I do not believe that the Voting Rights Act entitles any group, including white Democratic incumbents, to such preferential treatment. The Voting Rights Act prohibits the district lines to be drawn so that a minority's vote is *diluted* in such a way that they do not possess an equal opportunity to participate in the electoral process. By holding that the black vote must be maximized, the majority is, in essence, creating a favored race for voting purposes. I find that this was not the intention of Congress when it enacted the Voting Rights Act and subsequently amended the Act in 1982. Moreover, I find no judicial precedent for such a position.

Finally, it is difficult to find that there has been impermissible minority vote dilution in Ohio when one considers the fact that the blacks have been able to consistently elect more representatives in the six major urban counties than their percentage of the population would suggest. While blacks represented only 17.71% of the population under the 1980 census, black representation comprises 25% of the members of the House of Representatives for these six counties.

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[26] I wish to note that the claim is often raised that there is a flaw in the census taking procedure which results in an undervaluation of the existing black population. In that context the Court notes that the majority minority districts as created by the 1991 Apportionment Plan all contain a population that is *below* the ideal number of 109,567.

Fifteenth Amendment

Another avenue for relief for vote dilution is the fifteenth amendment. The Plaintiffs claim that they are entitled to relief under the fifteenth amendment because racial considerations played a part in the formation of the 1991 Apportionment Plan. The majority does not reach Plaintiffs' fifteenth amendment claim because it finds that the Defendant majority board members cannot establish a Voting Rights Act violation that would entitle them to redraw district lines in an attempt to create majority-minority districts. Since I believe both that the majority applied the wrong analysis, and that under the proper analysis no Voting Rights Act violation exists, I must address Plaintiffs' fifteenth amendment claim.

The United States Constitution Article XV states: "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." Unlike a claim under the Voting Rights Act, an aggrieved minority voter must show intentional discrimination in order to prevail on a fifteenth amendment violation. *Garza, supra.; Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984); *Mobile, supra; Armour v. State of Ohio*, 775 F. Supp. (N.D. Ohio 1991); and *Jeffers v. Clinton*, 740 F. Supp. 585 (E.D. Ark. 1990). Thus, to prove a fifteenth amendment violation, the minority voter must establish: (1) actual intent to discriminate; and (2) injury as a direct result of discrimination. *Armour, supra.*; and *Jeffers, supra.*

The leading case on fifteenth amendment violations in relation to apportionment plans is *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). In *Gomillion*, blacks challenged the redrawing of a district that eliminated all but four or five of its original 400 black voters without eliminating any white voters. In finding intentional black voter dilution, the Court relied on the result as well as the fact that the redistricting changed the district from a simple

square to an irregular 28 sided figure. The Court held that such maneuvering was highly suspect. In so holding, the Court noted that: "[w]hen a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the 15th Amendment." *Id.* at 346.

It is undisputed that the Defendant majority board members took race into consideration in creating the 1991 Apportionment Plan. Mr. Tilling repeatedly indicated in his deposition testimony and the facts presented at trial revealed that he was sensitive to the concerns of black political groups and worked with these groups to create the 1991 Plan. Plaintiffs argue that the fact that race was a consideration in drawing the district lines supports the finding of a fifteenth amendment violation.

Mere consideration of race, without more, is not sufficient to establish a fifteenth amendment violation. As the *Gomillion* Court noted, only specific discriminatory treatment violates the fifteenth amendment. Further, this Court in *Armour* held that there must be intentional diluting for political reasons in order to sustain a fifteenth amendment claim.

In this case, racial considerations did, indeed, play a part in the creation of the 1991 Apportionment Plan. Racial *discrimination*, however, did not. Under *Gomillion*, it is clear that there must be racial discrimination before a fifteenth amendment violation can be found. Plaintiffs have been unable to demonstrate an intent to discriminate. The evidence bears out that the Defendants considered race not for the purpose of discriminating against black voters, but rather to avoid violating the Voting Rights Act. If anything, the Defendants' consideration of race served to enhance the black vote. In light of these facts, I would not find a fifteenth amendment violation.

Ohio Constitution

This leaves just the Plaintiffs' claims under the Ohio Constitution. I agree with my colleagues that in light of the fact that these issues are pending before the highest court in Ohio, we should abstain.

Conclusion

In my view, judicial restraint in connection with apportionment of a state for legislative purpose is justified where:

1. The apportionment process has been completed in a manner consistent with the state's constitution.

2. The entire legislative body is elected on the basis of single member districts.

3. The apportionment of the state based upon the 1990 census figures does not violate the ten percent deviation rule adopted by the United States Supreme Court in *Connor v. Finch*, *supra*. in connection with continued compliance with the *Baker v. Carr*, *supra*. one man—one vote mandate.

4. The six urban counties in the state where the black population is primarily located are entitled to forty four of the ninety nine seats in the Ohio legislature and of those forty four districts, eleven are currently represented by minority representatives and there is no indication in the evidence before the Court that the apportionment has jeopardized the opportunity of the minority populations of the six counties to continue to elect the incumbent minority representatives.

5. The apportionment process was for the first time conducted in an open public manner with great deference to the black constituency in the six urban counties.

6. No election has yet been conducted.

7. Active judicial intervention in the apportionment process within approximately three weeks of the deadline for candidates to file for both the legislature and the senate threatens to work a hardship on the election process for the State of Ohio in 1992.

I am of the view that this case mandates judicial restraint. The Plaintiffs' have been unable to meet their burden of establishing a violation of the Voting Rights Act or the fifteenth amendment. Presented with a suitable plan, the Court should implement the 1991 Apportionment Plan and insure for Ohio an orderly election process in 1992.

Appendix 1

URBAN COUNTIES WITH BLACK INCUMBENT LEGISLATORS

County	No. Dist. [1]	1990 Pop. [2]	1990 Black Pop. [3]	% Black	Black Inc. Legislator [4]	1980 Pop. [5]	1980 Black Pop. [6]	% Black	M/M—+10% [7]
1. Cuyahoga	12.88	1,412,140	350,185	24.8	3	1,498,400	341,003	22.76	4-1
2. Franklin	8.77	961,437	152,840	15.9	2	869,126	131,016	15.07	1-1
3. Hamilton	7.90	866,228	181,145	20.9	2	873,204	165,994	19.01	2-1
4. Montgomery	5.24	573,809	101,817	17.7	2	571,697	94,561	16.54	1-1
5. Summit	4.70	514,990	61,185	11.9	1	524,472	56,831	10.84	0-1
6. Lucas	4.22	462,361	68,456	14.8	1	471,741	63,901	13.55	0-1
TOTALS	43.71	4,790,965	915,628	19.1	11	4,808,640	853,306	17.75	

[1] Figures represent the number of districts each county is entitled to based on the ideal district population of 109,567.

[2] Based on 1990 census information.

[3] Based on 1990 census information.

[4] Elected urder the 1981 Plan.

[5] Based on 1980 census information.

[6] Based on 1980 census information.

[7] "M/M" refers to majority-minority districts. The "10%" figure represents the influence districts that do not have a sufficient minority population to constitute a majority-minority district, but contain more than a 10% black population.

COUNTIES WITH POPULATION THAT EXCEEDS A SINGLE NUMBER DISTRICT

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M— +10%
7. Stark	3.26	367,585	25,052	6.82		378,823	24,111	6.36	0-1
8. Butler	2.66	291,479	13,134	4.51		258,787	12,072	4.66	0-0
9. Lorain	2.47	271,126	21,230	7.83		274,909	19,813	7.21	0-1
10. Mahoning	2.42	264,806	39,681	14.98		289,437	41,075	14.19	0-1
11. Trumbull	2.08	227,813	15,221	6.68		241,863	14,605	6.04	0-1
12. Lake	1.97	215,499	3,528	1.64		212,801	198	.09	0-0
13. Clermont	1.37	150,187	1,291	.86		128,483	921	.72	0-0
14. Clark	1.35	147,548	13,031	8.83		150,236	13,173	8.77	0-1
15. Portage	1.30	142,585	3,906	2.74		135,856	3,571	2.63	0-0
16. Green	1.25	136,731	9,611	7.03		129,769	8,792	6.78	0-0
17. Licking	1.17	128,300	2,217	1.73		120,981	2,036	1.68	0-0
18. Richland	1.15	126,137	9,981	7.31		131,205	9,373	7.14	0-0
19. Medina	1.12	122,354	850	.69		113,150	709	.63	0-0
TOTALS		2,592,150	158,733	6.12		2,566,300	150,449	5.86	

COUNTIES WITH A POPULATION WITHIN A FIVE PERCENT DEVIATION OF THE IDEAL POPULATION DISTRICT OF 109,567 MANDATING A SINGLE MEMBER DISTRICT FOR THE COUNTY[8]

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M—+10%
20. Warren		113,909	2,415	2.12		99,276	1,711	1.72	0-0
21. Wood		113,269	1,168	1.03		107,372	1,308	1.22	0-0
22. Allen		109,755	12,313	11.22		112,241	10,975	9.78	0-1
23. Columbiana		108,276	1,409	1.30		113,572	1,409	1.24	0-0
TOTALS		445,209	17,305	3.89		432,461	15,403	3.56	8-12

COUNTIES WITH A POPULATION WITHIN A TEN PERCENT DEVIATION OF THE IDEAL POPULATION DISTRICT OF 109,567 PERMITTING A SINGLE MEMBER DISTRICT FOR THE COUNTY[9]

24. Fairfield	1.1	103,461	1,153	1.11	93,678	319	.34	
25. Wayne	1.53	101,461	1,557	1.53	97,408	1,244	1.28	
26. Ashtabula	3.14	99,821	3,138	3.14	104,215	3,060	2.94	
TOTALS		304,743	5,848	1.92	295,301	4,623	1.57	

[8] *See* Ohio Constitution Article XI § 10(A).

[9] *See* Ohio Constitution Article XI § 10(B).

COUNTIES WITH A POPULATION THAT IS INSUFFICIENT TO PERMIT THE COUNTY CONSTITUTING A SINGLE MEMBER DISTRICT AND THUS REQUIRING THAT THE COUNTY BE PAIRED WITH ANOTHER COUNTY TO CREATE A SINGLE MEMBER DISTRICT

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M—+10%
27. Adams		25,371	47	.19		25,328	36	.14	
28. Ashland		47,507	460	.97		46,178	312	.68	
29. Athens		59,549	1,878	3.15		56,399	1,653	2.93	
30. Auglaize		46,585	66	.14		42,554	37	.09	
31. Belmont		71,074	1,308	1.84		82,569	1,592	1.93	
32. Brown		34,966	406	1.16		31,920	411	1.29	
33. Carroll		26,521	135	.51		25,598	115	.45	
34. Champaign		36,019	992	2.75		33,649	979	2.91	
35. Clinton		35,415	716	2.02		34,603	714	2.06	
36. Coshocton		35,427	415	1.17		36,024	414	1.15	
37. Crawford		47,870	253	.53		50,075	301	.60	
38. Darke		53,619	184	.34		55,096	170	.31	
39. Defiance		39,350	493	1.25		39,987	219	.55	
40. Delaware		66,929	1,424	2.13		53,840	1,259	2.34	

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M— +10%
41. Erie		76,779	6,312	8.22		79,655	5,888	7.39	
42. Fayette		27,466	662	2.41		27,467	724	2.64	
43. Fulton		38,498	93	.24		37,751	40	.11	
44. Gallia		30,954	871	2.81		30,098	913	3.03	
45. Geauga		81,129	1,056	1.30		74,474	990	1.33	
46. Guernsey		39,024	616	1.58		42,024	637	1.52	
47. Hancock		65,536	591	.90		64,581	523	.81	
48. Hardin		31,111	236	.76		32,719	211	.64	
49. Harrison		16,085	393	2.44		18,152	470	2.59	
50. Henry		29,108	147	.51		28,383	101	.36	
51. Highland		35,728	692	1.94		33,477	683	2.04	
52. Hocking		25,533	234	.92		24,304	117	.48	
53. Holmes		32,849	52	.16		29,416	10	.03	
54. Huron		56,240	597	1.06		54,608	577	1.06	
55. Jackson		30,230	218	.72		30,592	207	.68	
56. Jefferson		80,298	4,488	5.59		91,564	5,047	5.51	

57.	Knox	47,473	381	.80	46,304	294	.63
58.	Lawrence	61,834	1,559	2.52	63,849	1,541	2.41
59.	Logan	42,310	804	1.90	39,155	711	1.82
60.	Madison	37,068	2,764	7.46	33,004	1,523	4.61
61.	Marion	64,274	2,707	4.2	67,974	2,241	3.30
62.	Meigs	22,987	177	.77	23,641	206	.87
63.	Mercer	39,443	14	.04	38,334	17	.04
64.	Miami	93,182	1,779	1.91	90,281	1,768	1.96
65.	Monroe	15,497	19	.12	17,382	6	.03
66.	Morgan	14,194	570	4.02	14,241	554	3.90
67.	Morrow	27,749	64	.23	26,480	32	.12
68.	Muskingum	82,068	3,468	4.23	83,340	3,514	4.22
69.	Noble	11,336	7	.06	11,310	3	.03
70.	Ottawa	40,029	265	.66	40,076	245	.61
71.	Paulding	20,488	236	1.15	21,302	238	1.12
72.	Perry	31,557	57	.18	31,032	64	.21
73.	Pickaway	48,255	3,036	6.29	43,662	569	1.30
74.	Pike	24,249	327	1.35	22,802	242	1.06
75.	Preble	40,113	147	.37	38,223	140	.37

County	No. Dist.	1990 Pop.	1990 Black Pop.	% Black	Black Inc. Legislator	1980 Pop.	1980 Black Pop.	% Black	M/M— +10%
76. Putnam		33,819	26	.08		32,991	22	.07	
77. Ross		69,330	4,467	6.44		65,004	3,416	5.26	
78. Sandusky		61,963	1,553	2.51		63,267	1,322	2.09	
79. Scioto		80,327	2,458	3.06		84,545	2,389	2.83	
80. Seneca		59,733	1,172	1.96		61,901	1,168	1.89	
81. Shelby		44,915	615	1.37		43,089	503	1.17	
82. Tuscarawas		84,090	623	.74		84,614	654	.77	
83. Union		31,969	1,188	3.72		29,536	565	1.91	
84. Van Wert		30,464	193	.63		30,458	113	.37	
85. Vinton		11,098	4	.04		11,584	9	.08	
86. Washington		62,254	774	1.24		64,266	780	1.21	
87. Williams		36,956	23	.06		36,369	9	.02	
88. Wyandot		22,254	20	.09		22,651	13	.06	

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

The majority opinion and the dissent were filed with the Clerk on Friday, January 31, 1992. The dissent made reference to Appendix 2. However, Appendix 2 was still undergoing final review and not ready for filing.

Appendix 2 is now complete and the Clerk is directed to file the same and to forward copies to counsel of record and to Judge Jones and Judge Peck.

IT IS SO ORDERED.

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX 2

FACT FINDINGS

I. BACKGROUND

1. The legislative body for the State of Ohio is the General Assembly consisting of a ninety nine member House of Representatives and a thirty three member Senate.[1]

2. Section 1 of the Article XI of the Ohio Constitution places the responsibility for the apportionment of the State of Ohio for the members of the General Assembly in a five person group consisting of the Governor, Auditor of State, Secretary of State, and two persons from the Ohio General Assembly, one from the House of Representatives and one from the Senate. Section 1 requires that such persons or a majority of their number shall meet and establish the boundaries for each of the ninety-nine House of Representatives districts and the thirty-three State Senate districts. The meeting is to convene on a date designated by the Governor between August 1 and October 1 in every year ending in the number one, such as 1971, 1981, 1991, etc. The apportionment is to be published by October 5 in the year in which it is made.[2]

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[1] *See* Article XI, Section 2 of the Ohio Constitution.

[2] Section 1 of Article XI of the Ohio Constitution provides that both major political parties will be represented by two General Assembly members participating in the apportionment process. The issue of which political party controls the process is then determined by the outcome of the last state election for the office of Governor, Auditor of State and Secretary of State conducted prior to the constitutional mandate to apportion the state in every year ending in the number one. In 1990 the last such state election, Governor George Voinovich and Secretary of State Robert A. Taft, both members of the Republican party, and State Auditor Thomas Ferguson, a member of the Democratic party, were elected. Thus, the Republican party has a majority involved in the apportionment process as dictated by the Ohio Constitution.

3. The persons charged with the responsibility for the apportionment of the Ohio General Assembly in 1991 were three Republicans, Governor George Voinovich, Secretary of State Robert A. Taft, and State Senator Stanley Aronoff, and two Democrats, State Auditor Thomas Ferguson and State Representative Barney Quilter.

4. Apportionment in Ohio anticipates the use of the most recent Federal Decennial Census, if available.[3] The Court takes judicial notice that the census for Ohio in 1990 fixed the state's population at 10,847,133. Ohio is divided into eighty-eight counties. The dominant urban counties ranked by the 1980 census are Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), Montgomery (Dayton), Summit (Akron), Lucas (Toledo), Stark (Canton), Butler (Middletown), Lorain (Elyria) and Mahoning (Youngstown). The 1980 and 1990 population of the eighty-eight counties are set forth on Appendix 1.

5. In preparation for the 1991 apportionment, the Ohio Legislative Task Force, a bipartisan effort, funded by the Ohio General Assembly, was established to deal with the technical issues in the 1991 apportionment including the collection and computerization of census data.[4]

6. The Ohio Legislative Task Force engaged Cleveland State University to prepare a "unified data base" for use by interested groups and the general public in the 1991 apportionment process.[5] The unified data base included PL-94171 population counts, racial demographic data and election results for all 1990 statewide races and 1990 Ohio House and Senate races. Population data was prepared by census tracts and ultimately converted to population data by wards and precincts.

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[3] *See* Article XI, Section 2 of the Ohio Constitution.

[4] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 23-26.

[5] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 27.

All data created by Cleveland State University in the unified data base has been stipulated in this proceeding.

7. The persons responsible for the 1991 apportionment first met on August 22, 1991. Thereafter, public hearings were held at fifteen sites throughout the State of Ohio over the ensuing two and one half weeks. The purpose of the public hearings was to obtain public comment concerning the 1991 apportionment. This was the first time in Ohio history that such public apportionment hearings were held and that the public was given access to a data base and computer terminal.[6]

8. On September 26, 1991, proposed apportionment plans were submitted by: (1) the majority of persons responsible for apportionment (Governor Voinovich, Senator Aronoff and Secretary of State Taft); (2) the minority of the persons responsible for apportionment (Auditor Ferguson and Representative Quilter); (3) the Ohio Conference of Branches of the NAACP; (4) the Black Elected Democrats of Ohio (BEDO); and (5) the Ohio Republican Party.[7]

9. Defendants' Exhibit 1 is the apportionment plan submitted by the majority of persons responsible for apportionment and adopted on October 1, 1991, amended on October 3, 1991 and published by the Governor on October 5, 1991. Defendants' Exhibit 76 is the apportionment plan submitted by the Ohio Conference of Branches of the NAACP.[8] Defendants' Exhibit 77 is the plan submitted by BEDO. Defendants' Exhibit 78 is the plan submitted by Plaintiffs Ferguson and Quilter on behalf of the Ohio Democratic party. Defendants' Ex-

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[6] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 31-33.

[7] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 34-36.

[8] The plan of the Ohio Conference of Branches of the National Association for the Advancement of Colored People contained introductory material six pages in length and is attached as Appendix 2.

hibit 79 is the plan submitted by the Ohio Republican Party.

10. The 1991 apportionment plan as adopted by the defendants Voinovich, Taft and Aronoff, as it relates to the interests of minorities and minority districts, was thoroughly discussed with minority representatives.

II. THE APPLICATION OF THE OHIO CONSTITUTION TO THE APPORTIONMENT PROCESS

11. Article XI of the Ohio Constitution, as extensively amended in 1967 in an obvious response to the one man—one vote decision of *Baker v. Carr*, 369 U.S. 186 (1962), provides in considerable detail the procedure by which the apportionment process will be accomplished.

12. Article XI, Section 10 addresses the creation and numbering of House Districts and provides:

> § 10 [Creation and numbering of house of representative districts.]
>
> The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representative districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent

of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than whole ratio of representation shall be divided into house of representatives districts. *Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.*

(D) The remaining territory of the state shall be combined into representative districts.

On August 22, 1991, Mr. Tilling was designated Secretary to the persons responsible for apportionment and was directed to draft a 1991 Apportionment Plan.[9]

13. Article XI, Section 10(A) and (B) first address the creation of whole county districts, that is, a district to be created from a single county. Once those districts have been identified and established, the provisions of Article XI, Section 10(C) plug in and address the division of counties with more than one whole house ratio into districts, beginning with the largest county. Once the process has been completed with respect to counties entitled to more than one whole district, the apportionment of the remainder of the State is completed by following the provisions of Article XI, Section 10(D).[10]

Pursuant to Section 10(A) and (B), the adopted 1991 Apportionment Plan begins with the creation of seven single whole county districts.[11]

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[9] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 7.

[10] See fact finding #12, *supra*.

[11] The counties are Allen (House District 1 with a population of 109,760); Warren (House District 2 with a population of 113,915); Columbiana (House District 3 with a population of 108,278); Wood (House District 4 with a population of 113,272); Ashtabula (House

14. The Apportionment Plan, after designating the first seven single county whole districts, created house districts in successive numerical order in Cuyahoga, Franklin, Hamilton, Montgomery, Summit, Lucas, and Stark counties. Many of the urban counties had spillover into an adjoining county as required by the provisions of Article XI, Section 10(C), which requires that ". . . any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county." The provisions of Article XI, Section 10(C) prohibit the Apportionment Board from establishing more than one district in a county entitled to more than one whole district that spills over into adjoining territory. No claim is made nor is there any proof that the required spillovers from the urban counties violated Section 10(C).

15. The one ratio of representation as provided in Section 2 of Article XI of the Ohio Constitution divided into the 1990 population for the urban counties is demonstrated on Appendix 1.

16. Article XI, Section 7(D) addresses the possible retention of districts established in the preceding apportionment. Article XI, Section 7(D) provides:

> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent* with the requirements of Section 3 of this Article.
>
> (Emphasis added)

District 5 with a population of 99,821); Fairfield (House District 6 with a population of 103,453); and Wayne (House District 7 with a population of 101,441). The latter three counties were designated as single house districts pursuant to the discretionary power contained in Seciton 10(B).

17. Article XI, Section 3 of the Ohio Constitution describes the population requirements for house districts and states:

> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with Section 9 of this Article.

18. The ratio of representation for the 1991 apportionment of the House of Representatives as determined by the formula set forth in Article XI, Section 2 is 109,567.

19. Appendix A (Defendants' Exhibit 2) is a map of the Ohio house districts as configured in the 1981 apportionment.

20. Appendix B (Defendants' Exhibit 3) is a map of the Ohio senate districts as configured in the 1981 apporment.

21. Appendix C (Defendants' Exhibit 4) is a map of the Ohio house districts as configured in the 1991 Apportionment Plan as adopted.

22. Appendix D (Defendants' Exhibit 5) is a map of the Ohio senate districts as configured in the 1991 Apportionment Plan as adopted.

23. Appendix E (Defendants' Exhibit 6) is a colorized map showing Ohio house districts as configured in the 1991 Apportionment Plan as adopted.

24. Appendix F (Defendants' Exhibit 7) is a colorized map showing Ohio senate districts as configured in the 1991 Apportionment Plan as adopted.

25. Appendix G (Defendants' Exhibit 8) is a colorized map showing Ohio house districts as proposed by Plaintiffs' Ferguson and Quilter in the 1991 Minority Plan as proposed.

26. Appendix H (Defendants' Exhibit 9) is a colorized map showing Ohio senate districts as proposed by Plaintiffs Ferguson and Quilter in the 1991 Minority Plan as proposed.

27. Appendix I (Defendants' Exhibit 57) displays the 1981 house districts keyed to the 1990 census population. Fifty four of the 1981 districts, less the single whole county districts of Ashtabula, District 5, Fairfield County, District 6, and Wayne County, District 7, must be reconfigured because the population of the remaining fifty one districts fails to conform to the provisions of Article XI, Section 3 of the Ohio Constitution.[12]

28. Appendix J (Defendants' Exhibit 13) provides the population for each house and senate district as established in the 1991 Apportionment Plan. With the exception of H.D. 68 and S.D. 32, which will be discussed, each house and senate district complies with the population requirements of Article XI, Sections 3, 4 and 9 of the Ohio Constitution.[13]

29. Appendix K (Defendants' Exhibit 14) provides the population of each house and senate district as pro-

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[12] Five per cent (5%) of 109,567 is 5,478. The fifty one districts in the 1981 Apportionment Plan have an upward or downward shift in population in excess of 5,478.

[13] The defendants contend that in order to comply with other mandates of the constitution as well as the decision in the *Armour* case, it was necessary to create two undersized districts, House District 68 and Senate District 32. The question of whether those undersized districts which are below the 5% deviation limitation in the Ohio Constitution violate the Ohio Constitution is presently before the Ohio Supreme Court in a case brought by the defendants in this case wherein they seek a declaratory judgment approving the creation of House District 68 and Senate District 32.

posed by Plaintiffs Ferguson and Quilter in the 1991 Minority Plan as proposed.

30. Appendix L (Defendants' Exhibit 54) displays the 1981 senate districts with 1990 census populations.

31. Appendix M (Defendants' Exhibit 55) displays the 1990 populations for 1991 senate districts as configured in the 1991 Apportionment Plan as adopted. Appendix N (Defendants' Exhibit 56) displays the same information for senate districts as proposed by Plaintiffs Ferguson and Quilter in the proposed 1991 Minority Plan.

32. The majority of the apportionment board created multiple districts from whole counties in the following order: Cuyahoga, Franklin, Hamilton, Montgomery, Summit, Lucas, Stark, Butler, Lorain and Mahoning Counties.

a) Cuyahoga County (Cleveland) consists of House Districts 8-20. House District 15 spills over into three townships of Medina County, Hinckley, Granger and Sharon. The population fluctuation among the thirteen house districts in the thirteen districts of Cuyahoga County is from the low of 104,872 to a high of 114,955.

b) Franklin County (Columbus) consists of House Districts 21-29 and part of House District 29 spills over into Pickaway County and includes Darby, Scioto, Muhlenberg, Monroe, Jackson, Perry, Deer, and Wayne Townships; parts of Harrisburg Village and New Holland Village contained in Pickaway County; and the Villages of Orient, Commercial Point, Darbyville, and Williamsport. The population fluctuation among the nine house districts of Franklin County is from a low of 104,979 to a high of 113,427.

c) Hamilton County (Cincinnati) consists of House Districts 30-37 with no spill over into adjoining counties. The population fluctuation among

the eight house districts of Hamilton County is from a low of 104,424 to a high of 114,073.

d) Montgomery County (Dayton) consists of House Districts 38-43 with the only part of Montgomery County in the spillover House District 43 being Huber Heights City and the remaining portion of House District 43 is contained in part of Miami County to the north. The population fluctuation is from a low of 104,000 to a high of 111,246.

e) Summit County (Akron) consists of House Districts 44-48 with House District 48 spilling over into part of Portage County including Suffield, Rootstown, Randolph, and Atwater Townships and all of Brimfield Township, except for that part in the City of Kent, and the Village of Mogadore. The population fluctuation is from a low of 105,500 to a high of 113,614.

f) Lucas County (Toledo) consists of House Districts 49-53. House District 53 contains Oregon City, Jerusalem Township, and Harborview Village in Lucas County and the remainder of the district spills over and includes all of Ottawa County and the City of Sandusky in Erie County, and additionally, Perkins, Oxford, Groton, Margarette, and Kelley's Island Townships. The population fluctuation is from 104,395 to 113,501.

g) Stark County (Canton) consists of House Districts 54-57. The majority of House District 57 lies outside of Stark County and includes all of Carroll County, parts of Mahoning County (Youngstown) including Smith, Goshen, Berlin, Milton, Jackson, Ellsworth, Green, Beaver, and Springfield Townships, and part of Canfield Township and the City of Canfield, Sebring Village and New Middleton Village. The only parts of Stark County in House District 57 are the City of Alliance, the Village of Minerva, and

Paris, Washington and Lexington Townships. The population fluctuation is a low of 107,746 to a high of 113,515.

h) Butler County (Middletown) consists of House Districts 58-60. House District 60 includes part of Butler County and all of Trumbull County. The population fluctuation is a low of 107,036 and a high of 113,748.

i) Lorain County (Elyria) consists of House District 61-63. House District 63 contains a part of Lorain County, Erie County and Huron County. The population fluctuation is a low of 113,457 and a high of 114,684.

j) Mahoning County (Youngstown) consists of whole House Districts 64 and 65 and the remaining part of Mahoning County spills over into House District 57 (*see* 32(g) *supra*). House Districts 64 and 65 were created in response to the *Armour* decision.

III. THE PROCESS OF APPORTIONMENT AS FOLLOWED BY THE MAJORITY

A. In General

33. As indicated in the 1990 census, the total population of Ohio remained at approximately 10 million people, virtually the same as in the 1980 census. Ohio experienced only a net gain of population of 50,000 people. However, there were significant population shifts within the state. Specifically, there occurred a substantial shift in population from the Northeast quadrant of the state to the Central and Southwest portions of the state, particularly to Franklin, Delaware, Union and Madison counties. There also occurred a population shift from Cincinnati and Hamilton County to Butler, Clermont and Warren counties. Cuyahoga County lost one entire house district in population (109,000 people) while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous

county in the state. There were also significant population shifts from the inner cities to the suburbs.[14]

34. As a result of major population shifts within counties and from the inner city to the suburbs, the vast majority of the 1981 configured districts in all major urban areas had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution.[15] A summary of the 1981 house districts with 1990 census population data indicating whether the 1981 district meets the requirements of Article XI, Section 3, or is too high or too low follows:[16]

1981 APPORTIONMENT HOUSE DISTRICTS
WITH 1990 CENSUS POPULATION
FOR MAJOR URBAN COUNTIES

Ideal House District Population—109,567 Range—104,089-115,045		(Name of Black Representative Currently Serving The 1981 District)	Article XI, Section 3 Requirements
	CUYAHOGA COUNTY		
6	113,674		Meets requirements
7	107,304		Meets requirements
8	100,798		Too low
9	100,461		Too low
10	108,686		Meets requirements
11	96,086		Too low
12	84,098	(James)	Too low
13	104,883		Meets requirements
14	91,972	(Prentiss)	Too low
15	99,173		Too low
16	96,258	(Whalen)	Too low
17	107,097		Meets requirements
18	101,314		Too low
19	100,333		Too low

[14] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 61-63.

[15] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 79-80.

[16] The source is Defendants' Exhibit 58.

Ideal House District Population—109,567 Range—104,089-115,045		(Name of Black Representative Currently Serving The 1981 District)	Article XI, Section 3 Requirements
		HAMILTON COUNTY	
20	122,802		Too high
21	99,465		Too low
22	108,124		Meets requirements
23	97,630	(Mallory)	Too low
24	102,789		Too low
25	99,765	(Rankin)	Too low
26	119,239		Too high
27	116,413		Too high
		FRANKLIN COUNTY	
28	116,369		Too high
29	106,537	(Miller)	Meets requirements
30	118,913		Too high
31	97,764	(Beatty)	Too low
32	111,070		Meets requirements
33	115,186		Too high
34	138,011		Too high
35	157,601		Too high
		MONTGOMERY COUNTY	
36	115,907	(McLin)	Too high
37	108,769	(Roberts)	Meets requirements
38	116,087		Too high
39	106,321		Meets requirements
40	118,434		Too high
		SUMMIT COUNTY	
41	107,879		Meets requirements
42	105,536	(Sykes)	Meets requirements
43	108,031		Meets requirements
44	113,743		Meets requirements
		LUCAS COUNTY	
45	107,825	(Jones)	Meets requirements
46	108,701		Meets requirements
47	102,736		Too low
48	121,371		Too high

35. A summary of the statistical findings as it relates to the 1981 legislative districts as set forth in Fact Finding No. 34 in the context of the need to reconfigure as it applies to districts represented by incumbent minority (black) representatives follows:

a) Nine (9) out of the fourteen (14) districts in Cuyahoga County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 8, 9, 11, 12, 14, 15, 16, 18 and 19. These districts include all districts represented by minority incumbents (H.D. 12 (James), 15 (Prentiss) and 16 (Whalen)). The remaining districts (H.D. 6, 7, 11, 13 and 17) cannot be retained intact given the population requirements of the other districts. Moreover, the fourteen districts must be reduced to thirteen districts by reason of the population loss in Cuyahoga County.

b) Seven (7) out of the eight (8) districts in Hamilton County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 20, 21, 23, 24, 25, 26, and 27. These districts include the two districts represented by minority incumbents (H.D. 23 (Mallory) and H.D. 24 (Rankin)). The remaining district (H.D. 22) cannot be retained intact because of the population requirements of the other districts.

c) Six (6) out of the eight (8) districts in Franklin County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 28, 30, 31, 33, 34 and 35. These districts include the district represented by minority incumbent Otto Beatty (H.D. 31). The two remaining districts cannot be retained intact because of the population requirements of the other districts.

d) Three (3) out of the five (5) districts in Montgomery County must be reconfigured to meet the population requirements of Article XI, Section 3.

These districts are H.D. 36, 38 and 40. These districts include the district represented by minority incumbent McLin (H.D. 36). The remaining districts cannot be retained intact because of the population requirements of the other districts.

e) In Summit County, all districts (H.D. 41-44) meet the population requirements of Article XI, Section 3. These districts were reconfigured to avoid splitting the black community in Summit County and to avoid minority voter dilution.

f) In Lucas County, two (2) out of four (4) districts do not meet the requirements of Article XI, Section 3. These districts are H.D. 47 and 48. The remaining districts, including H.D. 45 represented by minority incumbent Jones, cannot be retained intact because of population requirements of other districts and to avoid minority voter dilution.

36. It was necessary to reconfigure the legislative districts in the major urban counties to comply with the population requirements of Article XI, Section 3 of the Ohio Constitution.

37. The comparisons of black population by district as configured in the 1981 apportionment, the 1991 Apportionment Plan adopted by the defendants (the majority plan) and the 1991 apportionment plan as proposed by the plaintiffs Ferguson and Quilter (the 1991 minority plan) follow:

COMPARISON OF HOUSE DISTRICTS WITH MINORITY REPRESENTATION IN 1981 DEMOCRAT PARTY 1991 MAJORITY APPORTIONMENT PLAN AND 1991 MINORITY APPORTIONMENT PLAN

1981 Democrat Plan	1991 Majority Plan [17]		1991 Minority Plan	
6-19 Cuyahoga	8-20 Cuyahoga		6-18 Cuyahoga	
16—94.67% [18]	10—63.42% [19]	67.35%	12—67.08%	70.81%
	1990 Pop. 105,514			
14—90.05%	12—65.13%	67.25%	16—66.67%	69.17%
	1990 Pop.—105,424			
12—74.80%	8—61.41%	65.64%	14—63.71%	68.20%
	1990 Pop.—104,972			
15—34.80%	9—58.36%	62.30%	13—60.18%	63.86%
	1990 Pop.—108,572			
17—26.14%	11—40.61%	43.01%	15—26.46%	27.89%
	1990 Pop.—105,024			
18—14.70%	14— 6.86%	7.92%	11— 7.32%	8.54%
19—14.40%	19— 3.71%	4.63%	18— 6.03%	6.87%
13— 4.99%	15— 3.25%	3.29%	9— 5.14%	6.05%
11— 4.44%	17— 2.34%	2.85%	17— 2.97%	3.12%
9— 4.16%	13— 2.32%	2.75%	7— 2.19%	2.62%
7— 2.36%	18— 1.31%	1.41%	8— 1.16%	1.23%
8— 2.12%	16— 0.45%	47%	10— 0.49%	0.66%
10— 0.64%	20— 0.23%	0.31%	6— 0.44%	0.47%
6— 0.49%				

[17] In every majority-minority or black influence district with respect to the eight urban counties of Cuyahoga, Franklin, Hamilton, Montgomery, Summit, Lucas, Stark and Mahoning, the population of the district is less than the ratio of representation number of 109,567.

[18] Black percentage of total population.

[19] Black Voting Age Population.

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
28-35 Franklin	21-29 Franklin		19-26 Franklin	
31—46.80%	21—50.30%	55.92%	21—50.60%	53.85%
	1990 Pop.—106,606			
29—38.50%	22—44.31%	48.29%	19—46.40%	50.80%
	1990 Pop.—104,979			
32—26.60%	26— 8.07%	8.66%	20—10.88%	12.45%
30—12.40%	25— 7.96%	8.41%	22— 6.61%	7.04%
28— 5.90%	23— 7.78%	8.32%	26— 5.23%	5.99%
34— 5.10%	29— 4.47%	4.32%	24— 4.15%	5.08%
33— 4.10%	24— 3.92%	4.22%	23— 4.78%	4.79%
35— 1.40%	28— 3.56%	3.75%	25— 1.49%	1.62%
	27— 3.09%	3.57%		
20-27 Hamilton	30-37 Hamilton		27-34 Hamilton	
25—53.20%	30—56.83%	62.07%	28—57.91%	61.26%
	1990 Pop.—106,539			
23—45.90%	31—52.60%	59.82%	33—47.10%	55.49%
	1990 Pop.—104,614			
24—32.30%	32—21.58%	24.00%	34—19.55%	21.67%
	1990 Pop.—104,424			
22—12.60%	35— 7.91%	8.96%	32—16.71%	18.46%
27—12.20%	33— 7.50%	8.04%	31— 3.55%	4.39%
20— 8.90%	36— 4.08%	4.49%	30— 3.26%	3.96%
21— 7.50%	37— 1.94%	2.14%	27— 3.11%	3.46%
26— 2.70%	34— 1.90%	2.14%	29— 2.30%	2.53%
36-40 Montgomery	38-43 Montgomery		35-39 Montgomery	
36—41.10%	38—50.70%	54.78%	36—45.26%	47.63%
	1990 Pop.—104,812			
37—36.10%	39—29.23%	32.35%	37—36.20%	40.79%
	1990 Pop.—104,427			
40— 6.20%	43— 3.61%	3.86%	35— 3.62%	4.23%
39— 4.70%	40— 2.84%	3.30%	39— 2.71%	3.21%
38— 0.91%	42— 2.28%	2.76%	38— 0.99%	1.09%
	41— 1.18%	1.31%		

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
41-44 Summit	44-48 Summit		40-43 Summit	
42—35.40%	44—39.52%	43.26%	42—43.09%	47.20%
	1990 Pop.—105,500			
44— 9.00%	45— 5.40%	6.29%	41— 3.81%	4.25%
43— 2.90%	47— 5.00%	6.00%	43— 2.54%	2.88%
41— 2.30%	46— 1.12%	1.33%	40— 2.24%	2.54%
	48— 0.61%	0.53%		
45-48 Lucas	49-52 Lucas		44-47 Lucas	
45—41.70%	49—47.65%	50.92%	45—44.98%	50.12%
	1990 Pop.—104,395			
47—13.20%	52— 4.85%	5.65%	46— 4.70%	5.73%
46— 5.30%	50— 4.23%	5.46%	47— 4.16%	5.22%
48— 2.80%	51— 2.18%	2.40%	44— 3.02%	3.34%
49-51 Stark	54-57 Stark		48-50 Stark	
50—14.90%	54—12.93%	15.15%	50—12.49%	14.49%
	1990 Pop.—108,609			
49— 4.43%	55— 3.39%	3.84%	49— 3.43%	3.84%
51— 1.30%	57— 2.64%	2.98%	48— 3.08%	3.52%
	56— 1.15%	1.20%		
52-53 Mahoning	64-65 Mahoning		55-56 Mahoning	
53—27.80%	64—31.19%	35.53%	55—31.19%	35.53%
	1990 Pop.—106,174			
52—10.50%	65— 1.48%	1.64%	56— 1.44%	1.60%
Total (Minority Districts Over 10%)				
24	16	16	18	18
Total (Minority—Majority (Over 50%))				
4	8	9	6	9

38. By way of summary, the 1991 Apportionment Plan has four (4) majority-minority districts in Cuyahoga County with black voting age populations of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with black populations of 74.89%, 90.05% and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%.[20]

39. The 1991 Apportionment Plan also creates a strong influence district in Cuyahoga County of 40.61% compared to an influence district of only 26.46% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.[21]

40. The 1991 Apportionment Plan has one (1) majority-minority district in Franklin County at 50.30% black voting age population where none existed in the 1980 apportionment. The 1991 Apportionment Plan also has a strong influence district at 44.31%. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs' Ferguson and Quilter also has one (1) majority-minority district at 50.60% black voting age population and one influence district at 46.40%. Significantly, part of the rationale in the 1991 Apportionment Plan for increasing relative black percentages in Franklin County house districts from the 1981 plan was to create a Senate influence district in Franklin County.[22]

41. The 1991 Apportionment Plan creates two (2) majority-minority districts in Hamilton County where only one existed in the 1981 apportionment. The majority-minority districts in the 1991 Apportionment Plan have

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[20] Defendants' Exhibit 77.

[21] Defendants' Exhibit 77.

[22] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 103-104.

black voting age populations of 52.60% and 56.83%. By way of camparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also reflects one (1) majority-minority district at 57.91%. The 1991 Apportionment Plan also reflects an influence district of 21.58% compared to 19.55% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

42. The 1991 Apportionment Plan reflects one (1) majority-minority district in Montgomery County, where none existed in the 1981 apportionment. The 1991 Apportionment Plan has a district with a black voting age population of 50.70% and an influence district at 29.23%. By way of comparison the plan presented by plaintiffs Ferguson and Quilter has no majority-minority districts and two influence districts at 36.20% and 45.26%. Plaintiffs challenge no districts in Montgomery County.

43. The 1991 Apportionment Plan reflects a slight increase in black population in House District 42, in Summit County, currently represented by minority incumbent Representative Sykes. The increase is from 35.40% to 43.26% black population. By way of comparison, the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter also increases the black population in Representative Sykes' district from 35.40% to 47.20%. Plaintiffs challenge no districts in Summit County.

44. The 1991 Apportionment Plan reflects an increase in black population in House District 45, in Lucas County, which is comparable to the district currently represented by minority incumbent Representative Casey Jones. The black voting age population in Jones' district was increased to 47.65% compared to 44.98% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. The black populations in House Districts 45 and 47 in the 1991 Apportionment Plan are substantially similar to the 1991 Apportionment Plan proposed by Plaintiffs Ferguson and Quilter.

45. In Stark County, there is not sufficient black population to form a majority-minority district.

46. The districts in Mahoning County are configured pursuant to the order of the Federal District Court in *Armour v. State of Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991).

47. Overall, there are eight (8) majority-minority districts in the 1991 Apportionment Plan compared to only four (4) in the 1981 apportionment and six (6) in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

48. Further, there is no relative reduction in the number of districts with over 10% black voting age population. In the 1991 Apportionment Plan, there are twenty (20) districts with over 10% black voting age population, precisely the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. Appendix O (Defendants' Exhibit 18).

49. The 1991 Apportionment Plan doubles the number of majority-minority districts in Ohio while maintaining the same relative composition of black population in the current districts represented by minority incumbents.

50. Appendix P (Defendants' Exhibit 21) reflects the percentage change in black population in districts served by minority incumbents. Three districts in Cuyahoga County with a black population of 74.8%, 90.1% and 94.6% under the 1981 apportionment plan were reduced to 65.6%, 67.0% and 67.0% black population.

51. All eleven (11) districts currently served by minority incumbents remain strongly Democratic districts. Appendix Q (Defendants' Exhibit 59).

IV. THE INTENTIONAL DISCRIMINATON CLAIM.

A. In General

52. Mr. Tilling was elected Secretary to the apportioning persons on August 22, 1991. Mr. Tilling was directed by the majority members of the Apportionment Board to draft a proposed Apportionment Plan.[23]

53. Mr. Tilling is Chief Executive Officer of the Ohio Senate and has been so employed since January, 1985.[24] Mr. Tilling has a B.S. degree in Social Sciences from Clarkson University, a Masters degree in political science from the University of Illinois, with a major in urban and metropolitan politics, and has completed course work toward a PhD.[25] Mr. Tilling is a former professor of political science at Ohio University where he taught from 1969 to 1976.[26]

54. In 1981, Mr. Tilling participated in a bipartisan effort to prepare the 1981 Congressional redistricting plan.[27] Mr. Tilling's testimony concerning the 1981 Congressional plan was considered by the Federal District Court in *Flanagan v. Gillmor*, 561 F. Supp. 36, 42 (S.D. Ohio, 1982), where a three judge court upheld the 1981 Congressional plan against claims of racial discrimination.

55. In 1981, Mr. Tilling observed the proposal of an Ohio Constitutional amendment to provide for fair and impartial state apportionment. The proposed amendment was supported by the ACLU and the Council of Churches but was defeated at the polls.[28]

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[23] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 7-8.

[24] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 4.

[25] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 5.

[26] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 6.

[27] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 10.

[28] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 10-11.

56. Mr. Tilling has served the last four years on the National Conference of State Legislators ("NCSL"), a bipartisan organization composed of representatives of all fifty states and designed to deal with issues of importance to state legislatures. Mr. Tilling is currently Vice-Chair of the NCSL Reapportionment Task Force.[29]

57. In his involvement with the NCSL Task Force, Mr. Tilling has chaired panels on minority voting issues under the Voting Rights Act.[30] Mr. Tilling has worked closely with Clifford Collins, Director of Voter Education of the NAACP, with James Daniels, State Chairman of the Ohio Conference of Branches of the NAACP, Frank Allison, President of the Cincinnati Branch of the NAACP, Fred Parker, President of the Columbus Branch of the NAACP, Floyd Johnson, State Coordinator for Ohio Apportionment, and other minority representatives.[31] Mr. Tilling has also participated in regional conferences, sponsored by the NAACP, regarding minority voting issues.[32] Mr. Tilling has also participated in panels, co-hosted by the United States Bureau of the Census, dealing with apportionment issues.[33]

58. On September 30, 1991, the Apportionment Board met to hear testimony from the various proponents of the proposed plans.[34]

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[29] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 9, 12.

[30] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 13, 14, 15, 18, 19.

[31] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 14, 15, 19.

[32] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 19.

[33] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 14.

[34] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 36-37.

59. On October 1, 1991, the Apportionment Board met again to consider adoption of a final plan of apportionment. The meeting was recessed from time to time to permit discussions among representatives of BEDO and the NAACP and Mr. Tilling to attempt to reach a consensus concerning minority districts.[35]

60. The above-referred discussions were initiated by Mr. Tilling after representatives of BEDO and the NAACP failed to reach a consensus regarding minority districts. Mr. Tilling contacted Congressman Stokes to attempt to bring the minority groups together. Mr. Tilling initiated these discussions since he knew that minority voting issues would be the focal point of the apportionment process.[36]

61. Floyd Johnson currently holds two offices in the NAACP. He is both the Chairman of the Political Action Committees for the Dayton Branch and the coordinator for reapportionment and redistricting for the Ohio Conference of Branches. Mr. Johnson has been associated with the NAACP for the last twenty-five years. He has held the position of chairman of the Political Action Committee for the Dayton branch for approximately five years and has held the position of Coordinator for Reapportionment and Redistricting for one year. Mr. Johnson was appointed Coordinator for Reapportionment and Redistricting for the Ohio Conference Branches of the NAACP.[37]

62. Mr. Johnson has been actively involved in minority voting issues since 1963.[38] Mr. Johnson assisted the late

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[35] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38-40.

[36] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 38, 39, 42.

[37] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 6, 7.

[38] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 11.

Representative C.J. McLin in voter registration drives encouraging minorities to register to vote.[39] Further, Mr. Johnson has been an active member of the Democratic Voters League; he was also a member of the Congress of Racial Equality in 1963, a supporter of the Nonviolent Coordinating Committee in 1963 and the Dayton Alliance for Racial Equality.[40] Additionally, Mr. Johnson has been a registered Democrat since 1960.

63. Mr. Johnson was primarily responsible for the preparation of the proposed apportionment plan submitted by the Ohio Conference of Branches of the NAACP.[41] Mr. Johnson solicited suggestions and recommendations from the Reapportionment and Redistricting Committee comprised of all of the presidents of the branches.[42] Most active among the branch presidents included Frank Allison from Cincinnati, Fred Parker from Columbus, Jesse Gooding from Dayton, and James Daniels, President of the Ohio Conference.[43] Mr. Johnson also discussed the proposed plan with Dana Mattison, the Executive Director of the Black Elected Democrats of Ohio.[44]

64. BEDO was represented in the October 1, 1991 Apportionment Hearing by Dana Mattison, its Executive Director.[45]

65. During the public hearing conducted on October 1, 1991, BEDO and the NAACP reached a consensus regarding the establishment of minority districts in Cuy-

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[39] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 11.

[40] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 12.

[41] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 18.

[42] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 16, 19.

[43] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 16.

[44] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 19.

[45] Deposition of Dana Mattison, Defendants' Exhibit 82, sub exhibit C; p. 14.

ahoga County in the final 1991 apportionment plan. The NAACP accepted BEDO's proposal for Cuyahoga County, establishing four majority-minority districts and one influence district in Cleveland. The NAACP's original plan established five majority-minority districts in Cuyahoga County. The plan originally submitted by the Board also called for five majority-minority districts in Cuyahoga County.[46]

66. On October 1, 1991, BEDO offered the consensus position with regard to the districts in Cuyahoga County as an amendment to the BEDO plan (referred to herein as the "BEDO Amendment"). The BEDO Amendment was also offered as an amendment to the plan proposed by the majority of persons responsible for apportionment.[47] The amendment was accepted by the Apportionment Board and incorporated in the final 1991 Apportionment Plan.[48]

67. At the meeting of October 1, 1991, Dana Mattison and Senator Jeff Johnson, a minority Senator from Cuyahoga County, endorsed the BEDO Amendment creating four majority-minority districts. Floyd Johnson, on behalf of the NAACP, endorsed the entire 1991 Apportionment Plan.[49]

68. The BEDO Amendment was endorsed by William Mallory, President of BEDO and Congressman Stokes.[50]

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[46] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 43.

[47] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 41.

[48] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 40, 44.

[49] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 40; Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 83-89; Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 58.

[50] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 89, 90, 91.

Appendix R (Defendants' Exhibit 24) is a letter from William Mallory to James Tilling dated October 1, 1991, confirming BEDO's support for the BEDO Amendment.[51]

69. The Ohio Conference of Branches of the NAACP endorsed the 1991 Apportionment Plan in its entirety.[52]

B. As to the Apportionment of Specific Counties.

70. As discussed above, BEDO and the NAACP both endorsed the 1991 Apportionment Plan as respects Cuyahoga County. BEDO Executive Director Dana Mattison supported the 1991 Apportionment Plan for Cuyahoga County given racial bloc voting in the county, the major population drifts from the inner city to the suburbs of Cleveland and low minority voter turnout in Cleveland.[53]

71. BEDO specifically recommended an *increase* from the 1981 plan in black population percentages in the two districts in Franklin County currently represented by Representatives Miller and Beatty to avoid minority vote dilution under the Voting Rights Act. Mr. Mattison testified:

> Q. So you increased Ray Miller's district more than the majority did in adopting the '91 plan?
>
> A. In this particular case.
>
> Q. Well, tell me generally why you went from 38 to 50 percent in Ray Miller's district?
>
> A. Well again we looked at the totality of circumstances, looked at a number of issues and came to the conclusion that these were the figures necessary again to comply with our understanding of the Voting Rights Act.[54]

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[51] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 116.

[52] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 57-59.

[53] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 14-16, 89-92; Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 58.

[54] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 58.

72. BEDO supported an *increase* in black population in both districts represented by minority incumbents, Representatives Mallory and Rankin, even though these incumbents have been elected over the years.

> Q. Now going back to Hamilton County just briefly, for a second, same situation. Rankin and Mallory have been representatives elected over a long period of time and yet you increased the percentage of black population.
>
> A. Uh-hum.
>
> Q. Why is that?
>
> A. Again, this is an individual district by district examination. We believe that communities respond differently based on a whole range of circumstances. Again, understand that Representative Rankin came to that district after her husband passed away, and there is a long-standing relationship with voters, but that does not mean that the trends indicate that that's going to continue over time, *and what we tried not to do was to construct districts based on incumbents. That's just not the reasonable thing to do.* (Emphasis added.)[55]

73. In Montgomery County House District 36 as established by the 1981 Apportionment Plan now exceeds the population requirements of Article XI, Section 3 of the Ohio Constitution. However, blacks are migrating from Representative McLin's district to Representative Robert's district so that, over time, McLin's district will lose black population and Robert's district will gain black population. Mr. Tilling recognized this population drift in his configuration of districts in Montgomery County.[56]

74. Both BEDO and Plaintiffs Ferguson and Quilter also recognized these population shifts in configuring

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[55] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 72.

[56] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 87-88.

districts in Montgomery County in their respective plans.[57]

75. Floyd Johnson, representing the NAACP, endorsed the 1991 Apportionment Plan as respects the configuration of all the minority districts in the 1991 Apportionment Plan, specifically those minority districts in Montgomery County. Mr. Johnson acknowledged that population shifts in Montgomery County required increases in black population in Representative McLin's district in order to maintain McLin's district as a minority district. Further, with the construction of the Trotwood corridor in the construction of Highway 35, black population would be displaced from Representative McLin's district.[58]

76. Mr. Tilling recommended an increase in the black population in Representative Sykes' district in Summit County to avoid minority voter dilution since the district is losing black population.[59] This recommendation was endorsed by Floyd Johnson for the NAACP.[60] BEDO also recommended an increase in the percentage of the black population in Sykes' district from 35% to 52% based on the same analysis.[61]

77. BEDO's plan increased the black population in Representative Jones' district in Lucas County due to population shifts in the district and because an expansion of the University of Toledo will displace black population.[62] Mr. Tilling employed the same rationale to the configuration of this district in Lucas County in the 1991 Apportionment Plan.[63]

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[57] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 70.

[58] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 46-48.

[59] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 88-89.

[60] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 50.

[61] Deposition of Dana Mattison, Defendants' Exhibit 98, p. 75.

[62] Deposition of Dana Mattison, Defendants' Exhibit 98, pp. 80-81.

[63] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 89-90.

78. Both BEDO and NAACP recognize that increasing the black population in certain districts will result in a marginal reduction in black population in other districts. It is not possible to increase the minority population of some districts without reducing it in others. Dana Mattison, for example, testified:

> Q. Why didn't BEDO maintain minority districts as they were in 1980 with a spread of black population of 12.20% up to 53% as opposed to creating two districts at 47 and 57 percent [in Hamilton County] and taking black population from the remaining districts?
>
> A. Well, primarily because of our understanding of totality of circumstances much of which was new to the political arena vis-a-vis the 1982 amendment to the Voting Rights Act that wasn't present in 1980, and based on our assessment these were the numbers that were required to comport with our understanding of the requirements.
>
> Q. But the effect of doing that, Mr. Mattison, is to reduce the black population in the remaining districts in Hamilton County?
>
> A. That's what happens when you've got too few African-Americans in a district based again on totality of circumstances and they got to come from somewhere.[64]

V. TOTALITY OF CIRCUMSTANCES

A. Geographical Cohesion of Minority Communities

82. Significant minority populations in all major urban counties are geographically compact and contiguous.[65]

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[64] Deposition of Dana Mattison, Defendants' Exhibit 98, pp. 56-57.

[65] Defendants' Exhibits 26, 30, 34, 38, 42, 46, and 50; deposition of James Tilling, Defendants' Exhibit 96, pp. 63-77.

83. The districts created in the 1991 Apportionment Plan are geographically compact and contiguous.[66]

B. Political Cohesion

84. All minority districts in the 1991 Apportionment Plan are politically cohesive. Blacks tend to vote for democratic candidates by a substantial majority.[67]

C. Racial Bloc Voting

85. In preparing the 1991 Apportionment Plan, Mr. Tilling considered election returns for house and senate and statewide races from 1982 through 1990. He also considered the Jesse Jackson primary campaign for President. Mr. Tilling did a precinct-by-precinct review and found significant evidence of racial bloc voting statewide.[68]

86. Defendants' expert, Dr. Gary King, is Professor of Government at Harvard University and is Director of the Harvard Data Center. Dr. King is a political scientist and statistician, specializing in quantitative methods and application of quantitative methods to redistricting. Dr. King received his Ph.D from the University of Wisconsin in 1984. Dr. King has published extensively in the area of apportionment. Dr. King has received numerous grants and awards in his area of expertise. Dr. King is an editorial board member of several scholarly journals published in his area of expertise. Dr. King has lectured

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[66] Defendants' Exhibits 27-29 (Cuyahoga), 31-33 (Franklin), 35-37 (Hamilton), 39-41 (Montgomery), 43-45 (Summit), 47-49 (Lucas) and 51-53 (Mahoning); Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 63-77.

[67] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 64-66.

[68] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 91-93.

extensively in the area of political science and apportionment.[69]

87. Dr. King analyzed over 200 elections in Ohio from 1982 through 1990. Dr. King conducted a bivariate ecological regression analysis and determined that *all* the data indicated significant racially polarized voting.[70]

88. Dr. King verified the results of his bivariate ecological regression analysis by conducting a homogeneous precinct analysis and an analysis based on an aggregated compound multinomial model. These analyses confirmed the results of the bivariate ecological regression analysis.[71]

89. There exists evidence of a history of official discrimination in the State of Ohio and local political subdivisions that touched the rights of minorities to participate in the democratic process. This evidence includes:

a) The 1981 apportionment plan was held to unlawfully dilute minority voting strength in *Armour v. State of Ohio*, Case No. C88-1104Y (Slip Op. dated 9/4/91);

b) In *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991), the Governor, Secretary of State, and Members of the Hamilton County Board of Elections conceded that the at-large election of Hamilton County Municipal Court Judges unlawfully diluted minority voting strength under S2 of the Voting Rights Act;

c) The 1991 apportionment plan resulted in only four (4) majority-minority districts in Ohio, three (3) of which were in Cuyahoga County;[72]

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[69] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 5-6; Curriculum Vitae of Dr. Gary King, Defendants' Exhibit 85.

[70] Deposition of Dr. Gary King, Deefndants' Exhibit 95, p. 40; Defendants' Exhibits 91 and 93.

[71] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 44.

[72] Defendants' Exhibit 17.

d) Until 1991, when the Republicans constituted a majority of persons responsible for apportionment, minorities did not effectively participate in the state apportionment process; [73]

e) No minority candidate has ever been elected to a partisan statewide office in Ohio,[74] but a minority candidate, Robert Duncan, was elected to the Ohio Supreme Court several decades earlier. Candidates for judicial office in Ohio run in a partisan primary, but on a non-partisan ballot in the general election.

f) There is governmental discrimination based on governmental apathy to the interests of the black community.[75]

g) Many public witnesses in the public hearings urged the persons responsible for apportionment to maintain and enhance majority-minority and influence districts throughout the state. These witnesses included:

1. James Mitchell, Black Elected Suburban Officials (August 28, 1991, p. 24);
2. Dana Madison, Executive Director of the Black Elected Democrats of Ohio (BEDO), (August 29, 1991, p. 37);
3. Dr. Gordon Welty, Wright State University (August 29, 1991, p. 20);
4. Jerry Hammond, former President of Columbus City Council (September 7, 1991, pp. 48-49);

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[73] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 95.

[74] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 41.

[75] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 31.

5. Samuel Gresham, Columbus Urban League (September 7, 1991, p. 61);

6. Mark Bradley, People's Coalition For Voter Participation (September 7, 1991, p. 61);

7. Wayne West, Young Black Democrats (September 7, 1991, p. 67);

8. Cathy Mock, President, Young Black Democrats (September 7, 1991, p. 109).

h) Both the NAACP and BEDO have taken the position that the persons responsible for apportionment must create majority-minority districts wherever possible and must maintain and enhance existing minority districts.[76]

90. There exists significant racially polarized voting throughout the State of Ohio.[77]

91. Minorities have experienced racial barriers to effective participation in the democratic process in Ohio. Examples include:

a) There is no consistent system of open primaries in the Democratic party. Endorsements and screening processes present barriers to minority candidates;[78]

b) Minorities receive no significant financial support from the State Democratic Party;[79]

c) "Electability" of blacks present further barriers to effective participation of blacks in primaries;[80]

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[76] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 47; Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 42-50.

[77] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 45.

[78] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 25-27.

[79] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 28.

[80] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 29.

d) Campaign financing and party endorsement pose effective racial barriers to black participation in the Democratic primary system.[81]

92. Minorities in Ohio bear the effects of discrimination in education, employment, and health which hinder their ability to participate effectively in the political process.

a) Blacks experience a significantly higher unemployment rate in Ohio and significantly less opportunity for professional employment. This occurs throughout the state and every major urban area in Ohio. Specifically, in 1990, the unemployment rate for white males was 4.6% but 16.6% for black males. Total unemployment for whites was 4.6% but 14.2% for blacks. Unemployment for whites, ages 16 to 19, was 11.6% but 40.4% for blacks, ages 16 to 19. The unemployment rate for blacks was 13.6% in Cincinnati, 17.3% in Cleveland, 6.8% in Columbus and 10.6% in Dayton—all significantly higher than whites. Similar statistics apply in 1988 and 1989; [82]

b) Minority voter turnout in Cleveland is extremely low due to minority frustration and apathy; [83]

c) The geographical displays of minority population concentrations indicate past discrimination in housing; [84]

d) Blacks are less mobile and less able to obtain housing due to past housing discrimination practices; [85]

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[81] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 23, 24.

[82] Defendants' Exhibits 64, 65 and 66; Deposition of James R. Tilling, Defendants' Exhibit 96, p. 97. *See also*, Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 36.

[83] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 52.

[84] Defendants' Exhibits 26, 30, 34, 38, 42, 46 and 50.

[85] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 37.

e) There are numerous reported cases in Ohio and in the Sixth Circuit finding minority discrimination in police and fire departments, in education, in housing, in elections, in state contracting, in employment and in zoning practices; [86]

f) School systems operate under desegregation orders in major urban areas in Ohio; [87]

g) As indicated by Mr. Tilling's participation on the Joint Select Committee on School Desegregation in the General Assembly (unanimously supported by Republicans), the effects of school desegregation in education in Ohio persist; [88]

h) The school system in Dayton and the police department are subject to desegregation orders; [89]

i) In 1981, the Democrats effectively precluded minority Senator Morris Jackson's participation in drawing district lines; [90]

j) In the early 1980's, Democrats foreclosed Senator Jackson's participation as a delegate to the Democratic National Convention.[91]

93. Political campaigns in Ohio have been characterized by overt or subtle racial appeal.

a) There is a recognition in state Democratic politics that people do not vote for blacks solely because of their race; [92]

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[86] Defendants' Exhibit 66.

[87] Defendants' Exhibit 66.

[88] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 96, 97.

[89] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 34.

[90] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 98.

[91] Deposition of James R. Tilling, Defendants' Exhibit 96, p. 98.

[92] Deposition of Dana Mattison, Defendants' Exhibit 82, p. 32.

b) Racial appeals exist in political campaigns as evidenced by prominent pictures of black candidates to reinforce the perception that the candidate is black; [93]

c) Opponents in campaigns raise the issue of "welfare" whenever a black candidate runs for office; [94]

d) Racial appeals exist in local races in Montgomery County. Higher voter turnout occurs when a black candidate runs for office; [95]

e) In 1980, Floyd Johnson ran against Ed Orlett, the endorsed candidate, in a primary for a house seat in Montgomery County. Mr. Johnson received virtually all of the black vote and insufficient white vote to gain the seat; [96]

f) Race plays a key role in politics in Central Ohio. Former President of City Council Jerry Hammond cited the Frances-Lashutka race for Columbus' City Attorney and the Moody-Rosemond races for Mayor; [97]

g) James Tilling, based on his experience in the Senate campaigns, testified that subtle or overt racial appeals have been made in numerous elections, citing the Forbes-Bonnano race in Cuyahoga County, the C.J. Thomas-Ike Thompson race, Virgil Browns' race for Secretary of State, Carl Stokes' race for Mayor in Cleveland, the Lashutka-Francis race for Columbus City Attory, the Moody-Francis race for Columbus

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[93] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 65-66.

[94] Deposition of Dana Mattison, Defendants' Exhibit 82, pp. 65-66.

[95] Deposition of Floyd Johnson, Defendants' Exhibit 97, p. 23.

[96] Deposition of Floyd Johnson, Defendants' Exhibit 97, pp. 11, 29.

[97] Testimony of Jerry Hammond, September 7, 1991, pp. 48-49.

Mayor and the Lashutka-Esp race for Columbus Mayor.[98]

E. Roll Call Analysis

94. Defendants' Exhibit 62 is a roll call analysis prepared by James R. Tilling. The analysis indicates strong Republican support for bills of interest to minorities. Absent Republican support in the Senate, the bills would never have been passed.[99]

VI. PARTISAN BIAS

95. Dr. Gary King, Defendants' expert, conducted an analysis of the partisan bias in the 1991 apportionment plan, Apportionment Plan (the "Tilling Plan"), the 1991 Democrats' Plan and the 1991 plan submitted by the Ohio Republican Party.[100]

96. Dr. King performed this analysis based on district and precinct level data for Ohio House and Senate elections.[101]

97. Dr. King conducted the analysis of partisan bias by use of a seats/vote curve, a methodology standardly accepted in the field for over 100 years.[102]

98. Partisan bias is measured by partisan symmetry. Partisan symmetry provides that political parties are treated fairly in the electoral system if votes are symmetrical to the number of seats awarded in an election.[103]

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[98] Deposition of James Tilling, November 20, 1991, pp. 195-198.

[99] Deposition of James R. Tilling, Defendants' Exhibit 96, pp. 114-126.

[100] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 14, 27, 32-38.

[101] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 7.

[102] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 13-14.

[103] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 16.

99. The seats/votes curve methodolgy is a regression methodology. Dr. King conducted a regression analysis and then calculated the variance around the seats/votes curve with standard deviations.[104]

100. The analysis of the 1971 and 1981 apportionment plans prepared by the Democrats in prior apportionments for the Ohio House indicates that the 1971 and 1981 apportionment plans were heavily biased in favor of the Democrats.[105]

101. The 1971 apportionment prepared by the Democrats has been characterized as the most partisan plan ever recorded in the political science literature. The 1981 apportionment plan prepared by the Democrats is also significantly biased in favor of the Democrats.[106]

102. Dr. King's analysis of the four plans in question for the Ohio House indicates that both the 1981 apportionment plan and the 1991 plan proposed by Plaintiffs Ferguson and Quilter are heavily biased in favor of the Democrats. The 1991 plan offered by the Ohio Republican Party is biased in favor of the Republicans. However, the 1991 Apportionment Plan (the "Tilling Plan") is not biased in favor of any political party.[107]

103. The results of Dr. King's analysis indicates that the 1991 Apportionment Plan reflects an average partisan bias of only -0.006, less than the standard error of .011.[108]

104. Dr. King's analysis of the plans for the Ohio Senate indicate that the 1981 Apportionment Plan can-

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[104] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 20-21.

[105] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 28-30; Defendants' Exhibit 88.

[106] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 7, 9.

[107] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 33-34; Defendants' Exhibit 90.

[108] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 35.

not be statistically distinguished from zero partisan bias.[109]

105. The results of Dr. King's regression analysis indicates that the 1991 Apportionment Plan is statistically indistinguishable from zero partisan bias for both the Ohio House and Senate and consequently is not a partisan gerrymandered plan.[110]

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[109] Deposition of Dr. Gary King, Defendants' Exhibit 95, p. 37; Defendants Exhibit 91.

[110] Deposition of Dr. Gary King, Defendants' Exhibit 95, pp. 34, 37.

APPENDIX A

DEFENDANT'S EXHIBIT 2

1981 OHIO HOUSE DISTRICTS

BEST AV

APPENDIX B

DEFENDANT'S EXHIBIT 3

1981 OHIO SENATE DISTRICTS

AILABLE COPY

APPENDIX C

DEFENDANT'S EXHIBIT 4

1981 APPORTIONMENT MAJORITY NEW HOUSE DISTRICTS FOR OHIO GENERAL ASSEMBLY

BEST AVA

APPENDIX D

DEFENDANT'S EXHIBIT 5

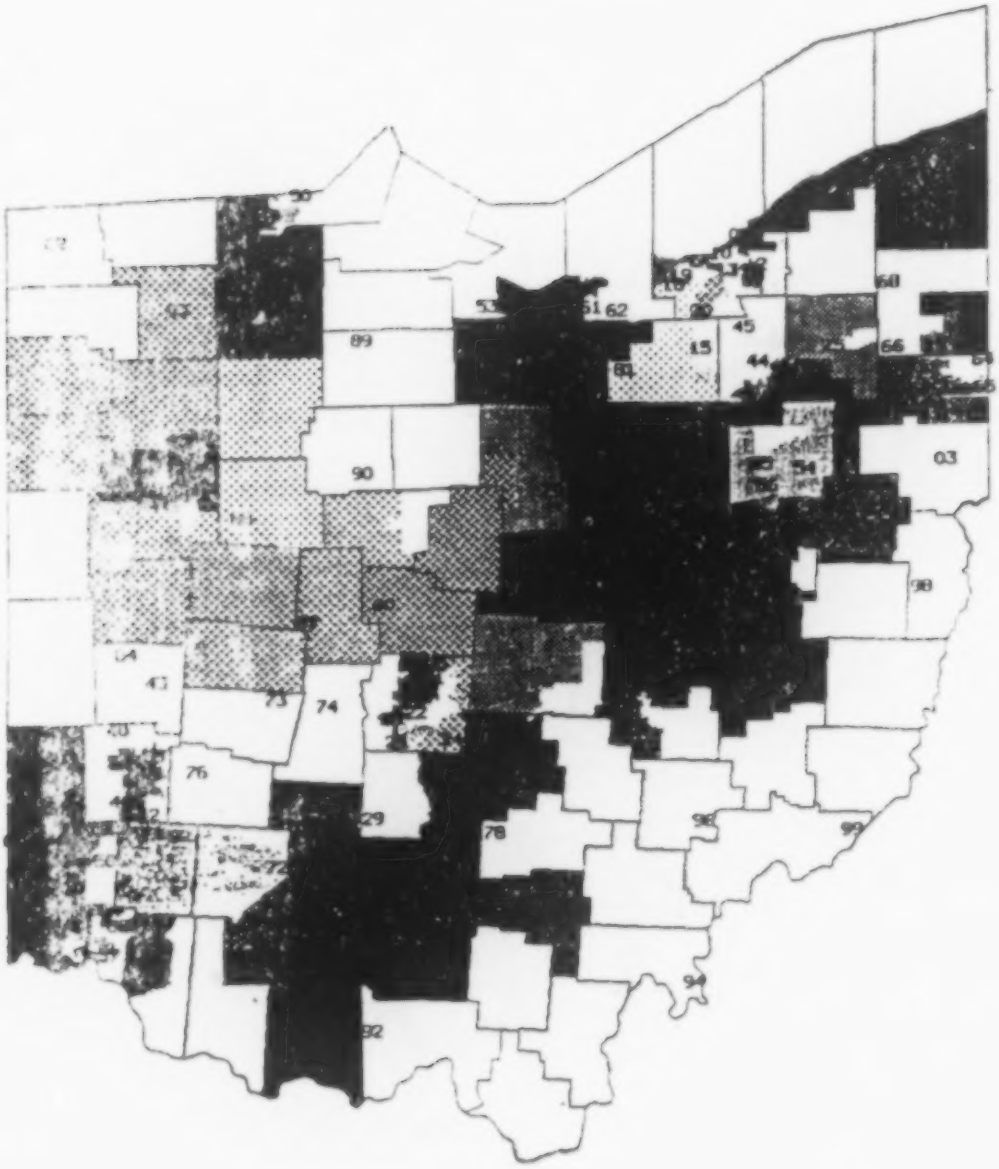
1991 APPORTIONMENT MAJORITY NEW SENATE DISTRICTS FOR OHIO GENERAL ASSEMBLY

ILABLE COPY

APPENDIX E

DEFENDANT'S EXHIBIT 6

1991 MAJORITY APPORTIONMENT HOUSE DISTRICTS

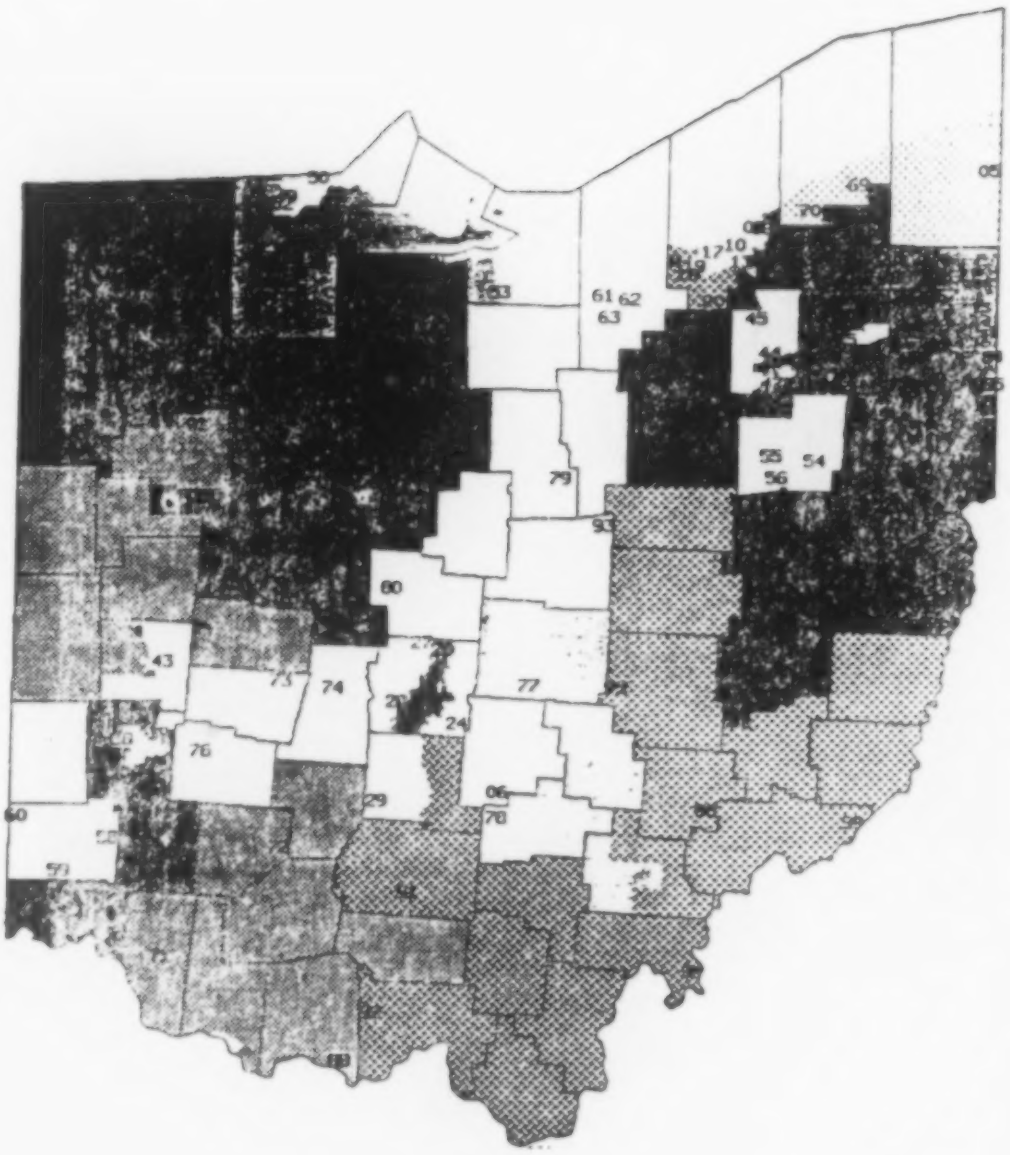


BEST AVA

APPENDIX F

DEFENDANT'S EXHIBIT 7

1991 MAJORITY APPORTIONMENT SENATE DISTRICTS



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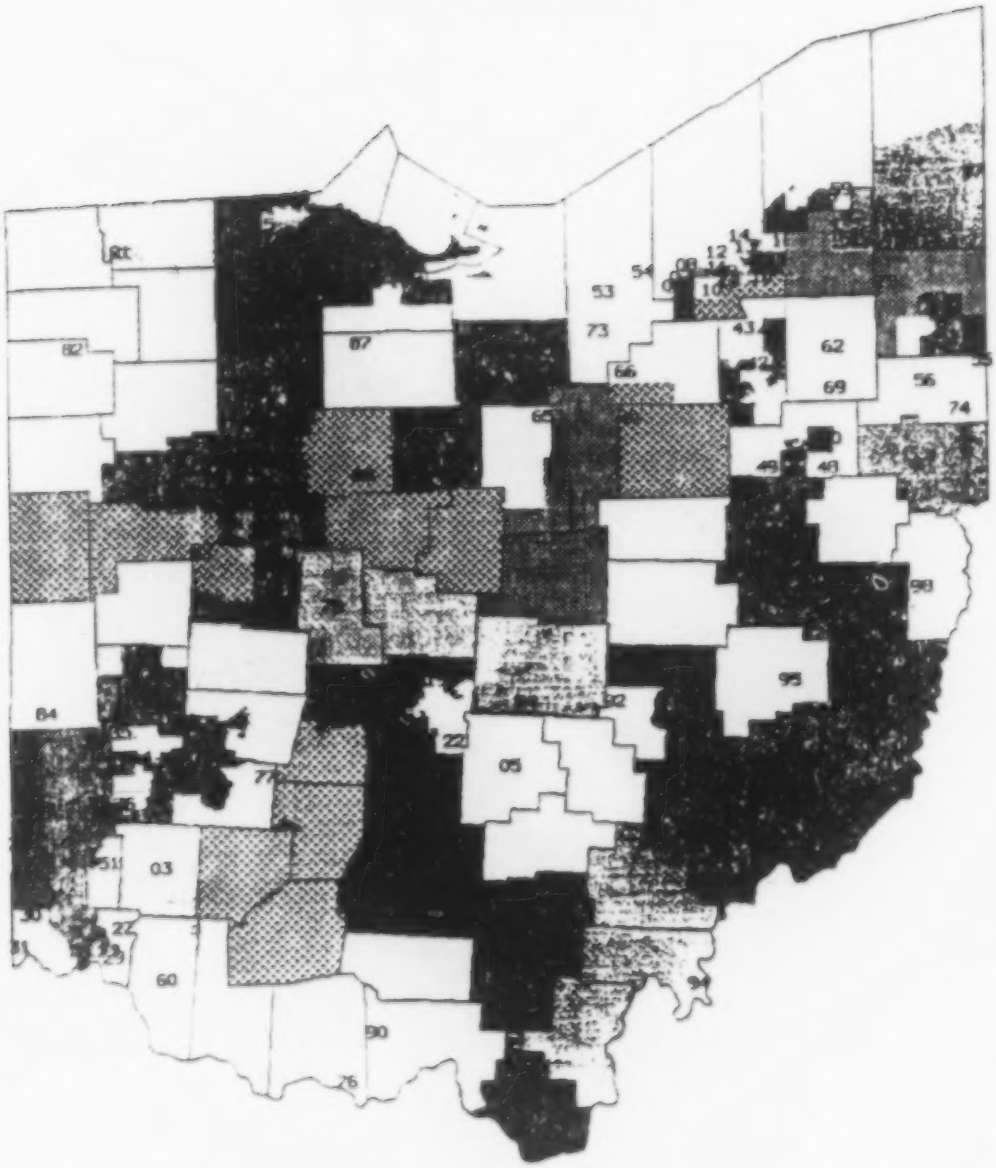
APPENDIX G

DEFENDANT'S EXHIBIT 8

1991 MINORITY APPORTIONMENT HOUSE DISTRICTS



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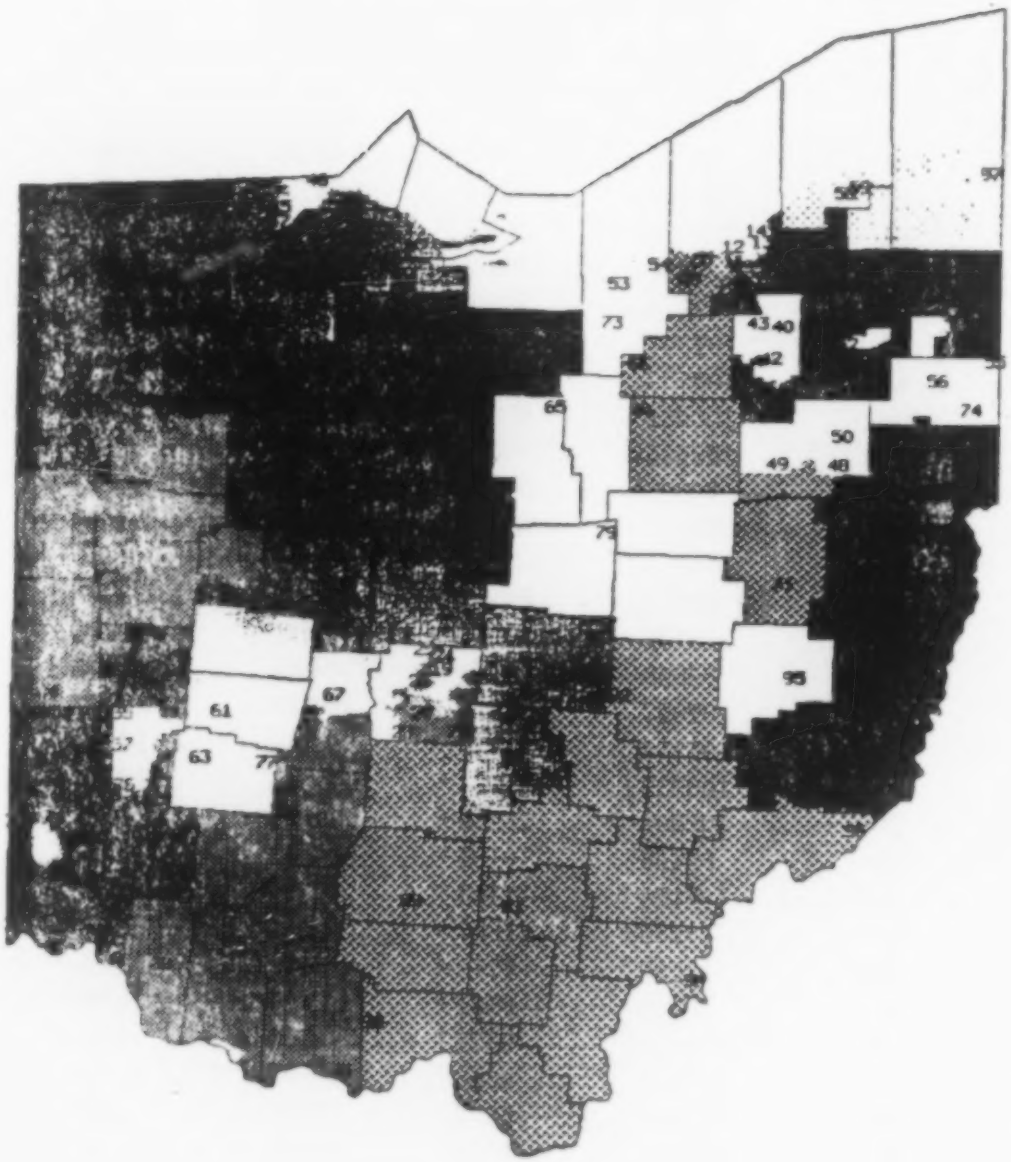
APPENDIX H

DEFENDANT'S EXHIBIT 9

1991 MINORITY APPORTIONMENT SENATE DISTRICTS



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APPENDIX I

DEFENDANT'S EXHIBIT 57

12/06/91

1981 APPORTIONMENT HOUSE DISTRICTS
WITH 1990 POPULATION

District	Population	Deviation	Percent Black	Percent Black VAP
01	109755	188	11.22	10.07
02	99821	−9746 *	3.14	2.81
03	108276	−1291	1.30	1.23
04	122354	12787 *	0.69	0.65
05	113269	3702	1.03	1.10
06	113674	4107	0.47	0.44
07	107304	−2263	2.41	2.00
08	100798	−8769 *	2.19	1.91
09	100461	−9106 *	4.28	3.59
10	108686	−881	0.62	0.51
11	96086	−13481 *	4.67	3.54
12	84098	−25469 *	75.25	71.63
13	104883	−4684	5.00	4.39
14	91972	−17595 *	90.39	88.45
15	99173	−10394 *	35.14	31.56
16	96258	−13309 *	94.92	94.23
17	107097	−2470	26.14	24.45
18	101314	−8253 *	14.83	13.88
19	100333	−9234 *	14.45	12.89
20	122802	13235 *	8.93	6.72
21	99465	−10102 *	7.53	5.85
22	108124	−1443	12.67	11.27
23	97630	−11937 *	46.07	39.78
24	102789	−6778 *	32.37	29.20
25	99765	−9802 *	53.34	49.58
26	119239	9672 *	2.73	2.46
27	116413	6846 *	12.26	10.82
28	116369	6802 *	5.95	5.24
29	106537	−3030	38.73	35.00
30	118913	9346 *	12.50	10.83
31	97764	−11803 *	46.98	42.49

District	Population	Deviation	Percent Black	Percent Black VAP
32	111070	1503	26.76	25.19
33	115186	5619	4.16	3.55
34	138011	28444 *	5.12	4.81
35	157601	48034 *	1.45	1.37
36	115907	6340 *	42.20	39.75
37	108769	−798	36.29	32.76
38	116087	6520 *	0.92	0.83
39	106321	−3246	4.71	3.65
40	118434	8867 *	6.22	5.57
41	107879	−1688	2.32	1.97
42	105536	−4031	35.53	32.01
43	108031	−1536	2.87	2.52
44	113743	4176	9.05	8.11
45	107825	−1742	41.95	37.61
46	108701	−866	5.37	4.45
47	102736	−6831 *	13.41	11.36
48	121371	11804 *	2.80	2.58
49	107339	−2228	4.46	3.98
50	104311	−5256 *	14.98	12.93
51	116672	7105 *	1.31	1.17
52	102329	−7238 *	10.66	9.52
53	98900	−10667 *	28.05	23.94
54	104411	−5156	7.73	6.77
55	99153	−10414 *	10.31	8.79
56	122892	13325 *	4.80	4.25
57	132647	23080 *	4.74	4.39
58	98904	−10663 *	2.37	2.32
59	97194	−12373 *	12.87	11.15
60	102963	−6604 *	1.04	1.01
61	112536	2969	2.18	1.98
62	110506	939	11.41	10.46
63	116110	6543 *	3.20	3.02
64	97795	−11772 *	9.98	9.45
65	111280	1713	8.33	8.66
66	125986	16419 *	0.93	0.86
67	109365	−202	1.68	1.58
68	113941	4374	1.57	1.43
69	106276	−3291	7.51	5.94

District	Population	Deviation	Percent Black	Percent Black VAP
70	102238	−7329 *	6.05	5.19
71	102840	−6727 *	4.02	3.55
72	103861	−5706 *	3.40	3.47
73	117203	7636 *	1.08	1.14
74	112844	3277	1.26	1.21
75	112214	2647	1.88	1.84
76	112125	2558	0.92	0.82
77	120266	10699 *	1.06	1.02
78	122386	12819 *	1.25	1.39
79	114804	5237	0.53	0.49
80	113879	4312	0.53	0.41
81	110715	1148	0.60	0.57
82	114875	5308	0.75	0.71
83	115397	5830 *	3.95	4.41
84	127068	17501 *	1.92	2.33
85	106082	−3485	2.55	2.20
86	102142	−7425 *	2.68	2.88
87	126643	17076 *	2.10	2.22
88	117585	8018 *	6.38	7.65
89	104576	−4991	2.66	2.98
90	104110	−5457 *	0.82	0.75
91	107881	−1686	3.19	2.96
92	103162	−6405 *	1.73	1.65
93	112658	3091	1.41	1.29
94	113490	3923	2.40	2.45
95	107300	−2267	1.01	1.00
96	107725	−1842	1.54	1.48
97	110611	1044	0.69	0.66
98	96383	−13184 *	5.06	4.60
99	97907	−11660 *	1.36	1.26

APPENDIX J

DEFENDANT'S EXHIBIT 93

District Report for Plan 'planrepo' House
Wed Dec 4 11:09:37 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	109755	11.22	10.07	1.13	1.00
02	113908	2.12	2.56	0.46	0.42
03	108275	1.30	1.23	0.37	0.30
04	113269	1.03	1.10	2.54	2.07
05	99821	3.14	2.81	1.54	1.19
06	103451	1.11	1.30	0.47	0.41
07	101441	1.53	1.40	0.42	0.35
08	104972	65.64	61.41	0.73	0.70
09	108572	62.30	58.36	0.86	0.84
10	105514	67.35	63.42	3.01	2.69
11	104799	43.01	40.61	0.92	0.83
12	105423	67.25	65.13	0.58	0.51
13	114859	2.85	2.32	10.95	8.82
14	112432	7.92	6.86	0.69	0.64
15	109713	3.29	3.25	0.65	0.60
16	106959	0.47	0.45	0.93	0.80
17	114174	2.75	2.34	4.96	3.93
18	108566	1.41	1.31	1.01	0.86
19	114955	4.63	3.71	2.10	1.76
20	113210	0.31	0.23	0.73	0.65
21	106606	55.92	50.30	1.04	1.02
22	104981	48.29	44.31	0.90	0.82
23	113429	8.32	7.78	0.97	0.98
24	108120	4.22	3.92	0.82	0.73
25	110612	8.41	7.96	0.93	0.87
26	105961	8.66	8.07	1.16	1.07
27	107162	3.57	3.09	0.97	0.90
28	111463	4.32	3.56	0.97	0.90
29	110026	3.75	4.47	0.92	0.92
30	106538	61.07	56.83	0.75	0.75

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
31	104614	59.82	52.60	0.64	0.65
32	104424	24.00	21.58	0.71	0.64
33	114073	8.04	7.50	0.52	0.50
34	104898	2.14	1.90	0.38	0.31
35	107202	8.96	7.91	0.66	0.54
36	111217	4.49	4.08	0.54	0.47
37	113258	2.14	1.94	0.61	0.53
38	104811	54.78	50.70	0.70	0.67
39	104426	32.35	29.23	0.87	0.78
40	106008	3.30	2.84	0.47	0.39
41	111245	1.31	1.18	0.68	0.62
42	108612	2.76	2.28	0.96	0.85
43	110863	3.86	3.61	0.79	0.71
44	105502	43.26	39.52	0.81	0.76
45	108806	6.00	5.40	0.59	0.50
46	106690	1.33	1.12	0.50	0.45
47	113164	6.29	5.00	0.53	0.47
48	109221	0.61	0.53	0.45	0.38
49	104394	50.92	47.65	5.44	4.38
50	113497	5.46	4.23	4.71	3.62
51	113494	2.40	2.18	1.50	1.25
52	109245	5.65	4.85	1.94	1.55
53	111136	6.07	5.24	2.90	2.38
54	108609	15.15	12.93	0.99	0.91
55	107746	3.84	3.39	0.82	0.77
56	111966	1.20	1.15	0.54	0.50
57	113515	2.98	2.64	0.46	0.40
58	107036	5.57	5.15	0.51	0.46
59	110810	5.30	4.67	0.55	0.49
60	113744	1.26	1.33	0.37	0.33
61	114270	15.91	13.81	11.57	9.43
62	113456	2.51	2.46	1.28	1.08
63	114683	0.63	0.60	1.25	1.00
64	106167	35.53	31.19	4.22	3.46
65	110906	1.64	1.48	1.13	0.93
66	104431	11.95	10.32	0.67	0.56
67	104513	2.38	2.36	0.68	0.60
68	99997	1.31	1.28	0.34	0.28

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
69	105926	2.29	2.07	0.83	0.73
70	108176	0.99	0.96	0.54	0.50
71	110472	0.93	0.84	0.51	0.47
72	110095	1.26	1.25	0.30	0.25
73	107159	11.86	10.76	0.59	0.49
74	108069	4.04	4.63	0.71	0.63
75	113458	3.27	3.08	0.60	0.54
76	106118	7.85	8.18	1.11	0.99
77	113885	1.90	1.78	0.50	0.42
78	114456	1.45	1.62	0.52	0.50
79	110517	8.91	8.46	0.73	0.62
80	110297	1.47	1.29	0.47	0.38
81	110339	0.76	0.71	0.59	0.52
82	114784	0.53	0.49	4.65	3.76
83	113878	0.53	0.41	3.39	2.72
84	114085	0.31	0.31	0.62	0.49
85	107290	1.53	1.51	0.50	0.43
86	114875	0.75	0.71	1.70	1.42
87	111458	3.29	3.81	0.55	0.52
88	112813	1.53	1.50	0.32	0.29
89	111876	2.43	2.10	4.53	3.68
90	107033	1.21	1.04	0.70	0.58
91	111012	4.30	4.92	0.44	0.43
92	112148	3.01	3.25	0.29	0.25
93	107335	0.90	0.81	0.73	0.56
94	114183	1.67	1.66	0.33	0.28
95	111796	0.88	0.90	0.31	0.25
96	114762	4.01	3.64	0.34	0.29
97	110909	0.96	0.91	0.30	0.24
98	107939	4.66	4.26	0.45	0.43
99	113348	1.21	1.14	0.26	0.23
Averages	109516	10.92	10.07	1.27	1.08

District Report for Plan 'planrepo' Senate
Wed Dec 4 11:08:28 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	343538	0.60	0.54	3.25	2.62
02	337899	3.15	2.82	2.31	1.90
03	324694	7.10	6.69	0.97	0.89
04	331592	4.01	3.64	0.47	0.42
05	320101	29.83	27.72	0.79	0.72
06	325866	2.44	2.07	0.71	0.62
07	338385	2.91	2.86	0.54	0.47
08	326174	6.45	5.83	0.52	0.45
09	315577	48.39	43.74	0.70	0.68
10	321346	7.91	7.85	0.80	0.70
11	327138	20.03	17.57	4.02	3.11
12	331131	4.32	3.97	0.75	0.64
13	342410	6.35	5.63	4.70	3.84
14	333381	1.24	1.20	0.38	0.33
15	325017	36.85	33.08	0.97	0.95
16	328651	3.88	3.70	0.95	0.90
17	337343	2.98	3.27	0.35	0.32
18	313924	2.12	1.91	0.96	0.79
19	328150	3.79	3.57	0.64	0.52
20	339907	2.05	1.91	0.30	0.26
21	319058	65.07	60.99	1.53	1.38
22	321495	1.86	1.83	0.56	0.49
23	343989	3.41	2.80	6.01	4.77
24	328736	0.73	0.66	0.88	0.77
25	322655	38.70	36.05	0.73	0.66
26	330368	2.32	2.33	1.95	1.60
27	328661	4.59	3.89	0.54	0.47
28	328182	15.24	13.73	0.62	0.56
29	328322	6.68	5.80	0.78	0.72
30	327125	2.29	2.14	0.38	0.32
31	331793	1.50	1.58	0.50	0.45
32	308942	5.27	4.73	0.57	0.49
33	330589	12.98	11.26	1.89	1.55
Averages	328550	10.82	9.92	1.27	1.07

House to Senate Assignments

Senate	House
01:	82, 83, 86
02:	04, 51, 53
03:	24, 25, 26
04:	58, 59, 60
05:	38, 39, 43
06:	40, 41, 42
07:	02, 36, 37
08:	33, 34, 35
09:	30, 31, 32
10:	73, 74, 76
11:	49, 50, 52
12:	01, 84, 85
13:	61, 62, 63
14:	71, 72, 88
15:	21, 22, 23
16:	27, 28, 29
17:	91, 92, 94
18:	05, 69, 70
19:	79, 80, 93
20:	95, 96, 99
21:	08, 09, 10
22:	07, 15, 81
23:	13, 17, 19
24:	16, 18, 20
25:	11, 12, 14
26:	87, 89, 90
27:	45, 46, 47
28:	44, 48, 75
29:	54, 55, 56
30:	03, 97, 98
31:	06, 77, 78
32:	66, 67, 68
33:	57, 64, 65

APPENDIX K

DEFENDANT'S EXHIBIT 94

District Report for Plan 'demo0930' House
Wed Dec 4 11:11:19 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	109755	11.22	10.07	1.13	1.00
02	108275	1.30	1.23	0.37	0.30
03	113908	2.12	2.56	0.46	0.42
04	113269	1.03	1.10	2.54	2.07
05	103451	1.11	1.30	0.47	0.41
06	113673	0.47	0.44	0.96	0.82
07	107260	2.62	2.19	1.42	1.20
08	114135	1.23	1.16	1.74	1.46
09	108063	6.05	5.14	1.86	1.57
10	109506	0.66	0.49	0.86	0.75
11	105670	8.54	7.32	15.82	13.22
12	104891	70.81	67.08	2.36	2.13
13	104758	63.86	60.18	0.82	0.79
14	105877	68.20	63.71	0.75	0.75
15	112720	27.89	26.46	0.91	0.81
16	106269	69.17	66.67	0.57	0.52
17	112526	3.12	2.97	0.62	0.59
18	106785	6.87	6.03	0.69	0.64
19	104912	50.80	46.40	1.02	0.95
20	111747	12.45	10.88	1.28	1.25
21	105539	53.85	50.60	0.89	0.84
22	107890	7.04	6.61	0.87	0.82
23	107563	4.79	4.15	0.73	0.66
24	114746	5.08	4.78	0.90	0.80
25	114655	1.62	1.49	0.99	0.93
26	109984	5.99	5.23	1.11	1.02
27	114704	3.46	3.11	0.65	0.57
28	104246	61.26	57.91	0.63	0.59
29	109991	2.53	2.30	0.59	0.52
30	112793	3.96	3.26	0.41	0.35

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
31	105394	4.39	3.55	0.51	0.48
32	107674	18.46	16.71	0.58	0.51
33	105690	55.49	47.10	0.78	0.81
34	105731	21.67	19.55	0.67	0.58
35	106995	4.23	3.62	0.89	0.79
36	104213	47.63	45.26	0.48	0.42
37	104544	40.79	36.20	0.88	0.81
38	114880	1.09	0.99	0.82	0.75
39	114603	3.21	2.71	1.00	0.89
40	111432	2.54	2.24	0.56	0.49
41	113674	4.25	3.81	0.54	0.47
42	104890	47.20	43.09	0.81	0.76
43	110906	2.88	2.54	0.52	0.45
44	114864	3.34	3.02	1.60	1.32
45	104278	50.12	44.98	2.77	2.32
46	111845	5.73	4.70	2.51	1.98
47	109644	5.22	4.16	6.67	5.05
48	114941	3.52	3.08	0.63	0.56
49	111681	3.84	3.43	0.72	0.68
50	113964	14.49	12.49	0.97	0.90
51	107036	5.57	5.15	0.51	0.46
52	111635	5.27	4.63	0.55	0.49
53	104733	9.77	8.31	12.58	10.28
54	105133	7.69	6.73	1.39	1.17
55	106167	35.53	31.19	4.22	3.46
56	114523	1.60	1.44	1.11	0.93
57	114568	2.31	2.27	0.71	0.62
58	108645	1.01	0.97	0.53	0.49
59	106854	2.27	2.07	0.84	0.73
60	105632	1.01	0.94	0.48	0.44
61	104588	11.96	10.92	0.74	0.60
62	106173	3.44	3.23	0.62	0.55
63	111280	8.33	8.66	1.11	1.00
64	114756	1.90	1.78	0.50	0.42
65	108616	8.95	8.47	0.77	0.65
66	112987	0.74	0.69	0.60	0.52
67	109949	2.30	2.06	0.73	0.66
68	113700	1.63	1.48	0.35	0.29

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
69	110497	0.98	0.81	0.46	0.39
70	105119	5.85	5.01	3.54	2.92
71	111087	0.74	0.71	0.31	0.26
72	112919	1.27	1.33	0.36	0.33
73	108078	3.32	3.40	1.04	0.91
74	110771	10.95	9.47	0.59	0.51
75	114838	1.27	1.22	0.38	0.32
76	104891	0.64	0.65	0.33	0.28
77	104429	1.78	1.76	0.55	0.50
78	112438	2.34	2.47	0.46	0.40
79	112500	0.97	0.89	0.38	0.30
80	110827	1.42	1.30	0.41	0.34
81	114804	0.53	0.49	4.65	3.76
82	113878	0.53	0.41	3.39	2.72
83	111142	0.76	0.69	0.58	0.47
84	106587	0.76	0.72	0.53	0.43
85	111842	0.78	0.74	1.66	1.39
86	110792	3.69	4.24	0.38	0.38
87	108293	2.48	2.14	4.14	3.31
88	114276	2.44	2.62	0.65	0.57
89	113349	6.60	7.91	0.58	0.62
90	104575	2.66	2.98	0.32	0.28
91	104110	0.82	0.75	1.20	0.98
92	107880	3.19	2.96	0.31	0.27
93	107397	1.68	1.61	0.26	0.23
94	113490	2.40	2.45	0.58	0.54
95	107300	1.01	1.00	0.33	0.27
96	107724	1.54	1.48	0.32	0.26
97	112699	2.94	2.67	1.40	1.08
98	106819	4.33	3.98	0.49	0.46
99	112076	1.52	1.40	0.25	0.22
Averages	109554	10.94	10.07	1.30	1.10

District Report for Plan 'demo0930' Senate
Wed Dec 4 11:13:39 1991

Target Population = 0

District	Persons	% Black	% Black VAP	% Hisp	% Hisp VAP
01	340524	0.61	0.55	3.25	2.62
02	333252	3.35	2.98	2.53	2.08
03	339350	3.01	2.77	0.87	0.80
04	331592	4.01	3.64	0.47	0.42
05	315753	30.66	28.21	0.75	0.68
06	343183	1.98	1.72	0.73	0.65
07	338604	2.70	2.66	0.57	0.50
08	325863	8.89	7.79	0.50	0.44
09	315668	46.07	41.57	0.69	0.66
10	320297	7.38	7.15	0.81	0.71
11	325768	19.77	17.43	3.99	3.11
12	327486	4.26	3.89	0.75	0.64
13	317945	6.89	6.10	4.96	4.05
14	321316	1.81	2.01	0.40	0.37
15	322199	38.50	34.50	1.07	1.03
16	325437	5.94	5.33	0.91	0.84
17	325322	3.71	4.29	0.39	0.38
18	328198	2.08	1.89	0.93	0.77
19	328417	3.62	3.48	0.49	0.41
20	329096	2.38	2.30	0.41	0.37
21	315527	67.62	63.61	1.31	1.21
22	334902	0.96	0.89	0.44	0.38
23	327869	5.17	4.35	6.31	5.01
24	330440	1.23	1.02	1.07	0.92
25	331516	32.72	30.95	0.71	0.64
26	326680	1.94	1.87	1.98	1.61
27	327229	16.97	15.10	0.63	0.56
28	330345	2.90	2.63	0.54	0.47
29	340587	7.30	6.32	0.77	0.71
30	327171	2.36	2.19	0.37	0.33
31	330645	1.80	1.86	0.48	0.41
32	336193	3.40	3.20	0.59	0.53
33	331462	15.59	13.46	1.93	1.59
Averages	328662	10.84	9.93	1.29	1.09

House to Senate Assignments

Senate	House
01:	81, 82, 85
02:	04, 44, 70
03:	24, 25, 67
04:	51, 52, 72
05:	35, 36, 37
06:	38, 39, 68
07:	03, 27, 29
08:	30, 31, 32
09:	28, 33, 34
10:	61, 63, 77
11:	45, 46, 47
12:	01, 83, 84
13:	53, 54, 73
14:	60, 76, 86
15:	19, 20, 21
16:	22, 23, 26
17:	89, 90, 93
18:	58, 59, 97
19:	65, 79, 95
20:	92, 94, 96
21:	12, 13, 14
22:	66, 71, 80
23:	08, 09, 11
24:	06, 07, 10
25:	15, 16, 17
26:	87, 88, 91
27:	40, 42, 43
28:	41, 62, 69
29:	48, 49, 50
30:	02, 98, 99
31:	05, 64, 78
32:	18, 57, 75
33:	55, 56, 74

APPENDIX L

DEFENDANT'S EXHIBIT 54

12/04/91

1981 SENATE DISTRICTS WITH 1990 CENSUS POPULATION

District	Population	Black Percent	Percent Black VAP	Percent Hispanic	Percent Hispanic VAP
01	343558	0.60	0.54	3.25	2.62
02	336877	3.19	2.86	2.33	1.91
03	422255	2.84	2.74	0.76	0.69
04	372743	3.61	3.29	0.50	0.44
05	341144	14.25	12.99	0.69	0.61
06	338315	16.25	14.75	0.77	0.69
07	362720	5.51	5.15	0.59	0.52
08	330392	9.73	7.96	0.51	0.45
09	300184	43.79	39.56	0.65	0.63
10	334001	7.18	6.95	0.75	0.66
11	319262	20.31	17.96	4.08	3.18
12	335867	5.22	5.05	0.73	0.64
13	307425	7.10	6.28	5.07	4.13
14	350828	1.49	1.56	0.37	0.33
15	320670	29.35	25.76	1.03	0.97
16	345169	14.30	13.02	0.96	0.92
17	334237	3.59	4.05	0.47	0.47
18	315320	2.11	1.91	0.95	0.79
19	322578	3.84	3.63	0.53	0.44
20	312932	1.30	1.25	0.30	0.25
21	275243	65.85	61.86	1.63	1.47
22	334335	10.20	9.65	0.66	0.58
23	297346	3.70	3.01	6.70	5.33
24	329664	1.15	0.97	1.03	0.89
25	297906	40.58	37.57	0.72	0.67
26	312334	2.02	1.94	2.28	1.86
27	327310	15.55	13.99	0.64	0.58
28	330265	4.30	3.60	0.52	0.45
29	328322	6.68	5.80	0.78	0.72
30	315270	2.24	2.09	0.38	0.33
31	339632	2.01	1.95	0.42	0.36
32	308942	5.27	4.73	0.57	0.49
33	304069	14.07	12.17	2.02	1.65
*** Total ***					
	10847115				

APPENDIX M

DEFENDANT'S EXHIBIT 55

District Report for Plan 'planrepo' Senate
Mon Dec 2 10:48:38 1991

Target Population = 0

District	% Black	% Black VAP	% Hisp	% Hisp VAP
01	0.60	0.54	3.25	2.62
02	3.15	2.82	2.31	1.90
03	7.10	6.69	0.97	0.89
04	4.01	3.64	0.47	0.42
05	29.83	27.72	0.79	0.72
06	2.44	2.07	0.71	0.62
07	2.91	2.86	0.54	0.47
08	6.45	5.83	0.52	0.45
09	48.39	43.74	0.70	0.68
10	7.91	7.85	0.80	0.70
11	20.03	17.57	4.02	3.11
12	4.32	3.97	0.75	0.64
13	6.35	5.63	4.70	3.84
14	1.24	1.20	0.38	0.33
15	36.85	33.08	0.97	0.95
16	3.88	3.70	0.95	0.90
17	2.98	3.27	0.35	0.32
18	2.12	1.91	0.96	0.79
19	3.79	3.57	0.64	0.52
20	2.05	1.91	0.30	0.26
21	65.07	60.99	1.53	1.38
22	1.86	1.83	0.56	0.49
23	3.41	2.80	6.01	4.77
24	0.73	0.66	0.88	0.77
25	38.70	36.05	0.73	0.66
26	2.32	2.33	1.95	1.60
27	4.59	3.89	0.54	0.47
28	15.24	13.73	0.62	0.56
29	6.68	5.80	0.78	0.72
30	2.29	2.14	0.38	0.32
31	1.50	1.58	0.50	0.45
32	5.27	4.73	0.57	0.49
33	12.98	11.26	1.89	1.55
Averages	10.82	9.92	1.27	1.07

House to Senate Assignments

Senate	House
01:	82, 83, 86
02:	04, 51, 53
03:	24, 25, 26
04:	58, 59, 60
05:	38, 39, 43
06:	40, 41, 42
07:	02, 36, 37
08:	33, 34, 35
09:	30, 31, 32
10:	73, 74, 76
11:	49, 50, 52
12:	01, 84, 85
13:	61, 62, 63
14:	71, 72, 88
15:	21, 22, 23
16:	27, 28, 29
17:	91, 92, 94
18:	05, 69, 70
19:	79, 80, 93
20:	95, 96, 99
21:	08, 09, 10
22:	07, 15, 81
23:	13, 17, 19
24:	16, 18, 20
25:	11, 12, 14
26:	87, 89, 90
27:	45, 46, 47
28:	44, 48, 75
29:	54, 55, 56
30:	03, 97, 98
31:	06, 77, 78
32:	66, 67, 68
33:	57, 64, 65

APPENDIX N

DEFENDANT'S EXHIBIT 56

District Report for Plan 'demo0930' Senate
Mon Dec 2 10:40:02 1991

Target Population = 0

District	% Black	% Black V	% Hisp	% Hisp VA
01	0.61	0.55	3.25	2.62
02	3.35	2.98	2.53	2.08
03	3.01	2.77	0.87	0.80
04	4.01	3.64	0.47	0.42
05	30.66	28.21	0.75	0.68
06	1.98	1.72	0.73	0.65
07	2.70	2.66	0.57	0.50
08	8.89	7.79	0.50	0.44
09	46.07	41.57	0.69	0.66
10	7.38	7.15	0.81	0.71
11	19.77	17.43	3.99	3.11
12	4.26	3.89	0.75	0.64
13	6.89	6.10	4.96	4.05
14	1.81	2.01	0.40	0.37
15	38.50	34.50	1.07	1.03
16	5.94	5.33	0.91	0.84
17	3.71	4.29	0.39	0.38
18	2.08	1.89	0.93	0.77
19	3.62	3.48	0.49	0.41
20	2.38	2.30	0.41	0.37
21	67.62	63.61	1.31	1.21
22	0.96	0.89	0.44	0.38
23	5.17	4.35	6.31	5.01
24	1.23	1.02	1.07	0.92
25	32.72	30.95	0.71	0.64
26	1.94	1.87	1.98	1.61
27	16.97	15.10	0.63	0.56
28	2.90	2.63	0.54	0.47
29	7.30	6.32	0.77	0.71
30	2.36	2.19	0.37	0.33
31	1.80	1.86	0.48	0.41
32	3.40	3.20	0.59	0.53
33	15.59	13.46	1.93	1.59
Averages	10.84	9.93	1.29	1.09

House to Senate Assignments

Senate	House
01:	81, 82, 85
02:	04, 44, 70
03:	24, 25, 67
04:	51, 52, 72
05:	35, 36, 37
06:	38, 39, 68
07:	03, 27, 29
08:	30, 31, 32
09:	28, 33, 34
10:	61, 63, 77
11:	45, 46, 47
12:	01, 83, 84
13:	53, 54, 73
14:	60, 76, 86
15:	19, 20, 21
16:	22, 23, 26
17:	89, 90, 93
18:	58, 59, 97
19:	65, 79, 95
20:	92, 94, 96
21:	12, 13, 14
22:	66, 71, 80
23:	08, 09, 11
24:	06, 07, 10
25:	15, 16, 17
26:	87, 88, 91
27:	40, 42, 43
28:	41, 62, 69
29:	48, 49, 50
30:	02, 98, 99
31:	05, 64, 78
32:	18, 57, 75
33:	55, 56, 74

APPENDIX O

DEFENDANT'S EXHIBIT 18

COMPARISON OF HOUSE DISTRICTS WITH BLACK VAP OVER 10% IN 1991 MAJORITY AND MINORITY APPORTIONMENT PLANS

House District	1991 Majority Plan	House District	1991 Minority Plan
12	65.13	12	67.08
10	63.42	16	66.67
8	61.41	14	63.71
9	58.36	13	60.18
30	56.83	28	57.91
31	52.60	21	50.60
38	50.70	33	47.10
21	50.30	19	46.40
49	47.65	36	45.26
22	44.31	45	44.98
11	40.61	42	43.09
44	39.52	37	36.20
64	31.19	55	31.19
39	29.23	15	26.46
32	21.58	34	19.55
61	13.81	32	16.71
54	12.93	50	12.49
73	10.76	61	10.92
66	10.32	20	10.88
1	10.07	1	10.07
TOTAL	20		20

APPENDIX P

DEFENDANT'S EXHIBIT 21

PERCENTAGE POPULATION OF HOUSE DISTRICTS WITH MINORITY REPRESENTATIVES

Current State Representative	1981 House District Number	1981 Percent Black Population	1991 House District Number	1991 Percent Black	Percentage Change
Troy James	12	74.8%	10	67.0%	−7.8
C. J. Prentiss	14	90.1%	8	65.6%	−24.5
Vermel Whalen	16	94.6%	12	67.0%	−27.6
William Mallory	23	45.9%	31	59.7%	+13.8
Helen Rankin	25	53.2%	30	60.9%	+7.7
Ray Miller	29	38.5%	21	55.7%	+17.2
Otto Beatty	31	46.8%	22	48.0%	+1.2
Rhine McLin	36	42.1%	38	54.6%	+12.5
Tom Roberts	37	36.1%	39	32.2%	−3.9
Vernon Sykes	42	35.4%	44	43.0%	+7.6
Casey Jones	45	41.7%	49	50.0%	+8.3

APPENDIX Q

DEFENDANT'S EXHIBIT 59

POLITICAL STRENGTH OF MINORITY INCUMBENTS—1991 APPORTIONMENT PLAN

1981 House District	Incumbent	Political Index	1991 House District	Political Index	Result
12	Troy James	80.15	10	79.04	Strongly Democratic
14	C.J. Prentiss	84.83	8	75.23	Strongly Democratic
16	Vermel Whalen	87.18	12	78.88	Strongly Democratic
23	William Mallory	65.74	31	69.28	Strongly Democratic
25	Helen Rankin	66.74	30	74.68	Strongly Democratic
29	Ray Miller	62.97	21	76.50	Strongly Democratic
31	Otto Beatty	66.33	22	69.35	Strongly Democratic
36	Rhine McLine	64.40	38	75.63	Strongly Democratic
37	Tom Roberts	62.52	39	64.40	Strongly Democratic
42	Vernon Sykes	58.64	44	72.21	Strongly Democratic
45	Casey Jones	64.99	49	77.64	Strongly Democratic

APPENDIX R

DEFENDANT'S EXHIBIT 24

THE BLACK ELECTED DEMOCRATS OF OHIO

37 West Broad Street, Suite 430
Columbus, Ohio 43215
Telephone 614/341-6912

October 1, 1991

Mr. James Tilling, Secretary
Ohio Reapportionment Board
Ohio Senate
Statehouse
Columbus, Ohio 43215

Dear Mr. Tilling:

This will serve as an official letter of support for the amendment offered by Dana Mattison for Cuyahoga County.

Sincerely,

/s/ William L. Mallory
REP WILLIAM L. MALLORY
President

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

[Filed Mar. 10, 1992]

On January 31, 1992, this Court filed its opinion and order holding that there is no legal mandate requiring the creation of majority-minority districts wherever possible in the 1991 Apportionment Plan for the Ohio General Assembly (the Plan). Furthermore, this Court found that the Apportionment Board had not conducted a totality of the circumstances analysis sufficient to establish a violation of the Voting Rights Act and justify the majority-minority districts delineated in the Plan. The Board was ordered to reconsider the Plan and either show justification under the totality of the circumstances test for the majority-minority districts or submit a revised plan.

On February 19, 1992, the Defendants submitted, *inter alia*, the Board's Findings and Conclusions and what they termed a revised apportionment plan which, however, is identical to the Plan except for correction of "technical errors." The Board's Findings include a totality of the circumstances analysis.

After careful review, we find that the Board's totality of the circumstances analysis contains only meager information that was not previously before this Court. Furthermore, the information is not of assistance in answering the "question whether the political processes are 'equally open' ", nor does the analysis constitute the "searching practical evaluation of the 'past and present reality' " contemplated by the legislative history of the 1982 amendments to the Voting Rights Act. S. Rep. No. 417, 97th Cong. 2d Sess. 30. Accordingly, the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965. As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution. "[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). It is therefore incumbent on this court to enjoin any election for the Ohio General Assembly until a constitutional plan is submitted by the Special Master and approved by this court.[1] Accordingly, the date of May 5,

[1] The most explicit statement of the power to enjoin state elections appears in *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972). The three-judge district court found that the

1992 for the holding of the Ohio primary election is vacated to the extent that candidates for election to the General Assembly are concerned, and the appropriate election officials are enjoined and directed to cause such primary election to be held on June 2, 1992, provided, however, that on proper showing the court may provide an alternate date.

The plan herein above referenced marks the second time that the Apportionment Board has failed to meet the standards mandated by federal law even in the face of clear and unambiguous legal direction from this Court. In this situation it is concluded that exceptional circumstances exist which require the appointment of a Special Master to prepare an acceptable apportionment plan. The Court therefore hereby appoints Lawrence A. Kane, Jr., 1900 Chemed Center, 255 E. 5th St., Cincinnati, Ohio, 45202, as such Special Master, for the purpose of submitting a plan which complies with federal and state law and this Court's January 31 order and opinion. This appointment is made pursuant to Rule 53 of the Federal Rules of Civil Procedure and the master herein appointed is to be sworn to accept the responsibilities and

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act apportioning the Minnesota legislature violated the Constitution, and accordingly, "enjoined the Secretary of State and the county auditors from conducting future elections under the Act, and appointed two Special Masters (a third was named later) to aid the court in formulating a new apportionment plan." *Id.* at 191. The court-ordered plan reduced the number of state legislative districts from 67 to 35. *Id.* at 188.

Although the Court found that the district court erred in so drastically reducing the legislature's size, *id.* at 199, the Court never questioned the power of the district court to reapportion the state legislature, *id.* at 195. The court's opinion also never questioned the power of the district court to postpone the elections: "If time presses too seriously, the District Court has the power appropirately to extend the time limitations imposed by state law." *Id.* at 201 n.11. On remand, the district court revised its court-ordered reapportionment plan and did extend the time limits. *Beens v. Bidahl*, 349 F. Supp. 97, 99-100 (D. Minn. 1972).

obligations established therein. In addition, the special master is specifically authorized and empowered to employ an expert or experts versed in the subject area and such other expert and lay assistance as may be appropriate in the circumstances. Costs incurred shall be assessed againt the State of Ohio.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones/MC
NATHANIEL R. JONES
U.S. Circuit Judge

/s/ John W. Peck
JOHN W. PECK
Senior U.S. Circuit Judge

Dowd, J. dissenting:

I find that the defendants have complied with the order of my colleagues published on January 31, 1992. The defendants were instructed to reconsider the 1991 apportionment plan and submit a revised plan unless the defendants were able to show a justification for the creation of additional majority-minority districts in the State of Ohio. In response the defendants filed an exhaustive set of fact findings [1] and engaged in a slight modification of the majority-minority districts.[2]

The basis for the creation of the majority-minority districts has been dismissed with the criticism that the justification is on a state-wide basis and does not include an analyis or justification on a district by district basis. I read the latest opinion of my colleagues to establish

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[1] On February 20, 1992 the defendants Voinovich, Taft and Aronoff filed findings and conclusions with respect to the creation of the majority-minority districts. The findings number 254 paragraphs and 106 pages and address such issues as History of Official Discrimination, Racial Bloc Voting, Racial Barriers to Effective Participation, Effects of Discrimination, Summary of Unemployment Rates by Race, Showing Disparate Unemployment Rates as to Blacks, Mean Household Income showing a great disparity between white and black households, an Analysis of Families Living Below Poverty Level, showing great disparity between white and black families, Education Findings, demonstrating that the percentage of blacks that have not completed high school and who have not completed one or more years of college are significantly higher than whites, findings that the value of housing between white families and black families are grossly disproportionate, the effects of overt or subtle racial appeals in the political process, the extent to which minorities had been elected to public office, and the lack of success of minorities in the election process in the major urban counties in Ohio other than Cuyahoga,

[2] After the majority of this Court remanded the 1991 Apportionment Plan to the Apportionment Board, downward adjustments as to black voters were made in six of the house districts represented by black incumbents with an increase in House District 38 represented by black incumbent Roberts.

the proposition that an apportionment body, be it a legislative body or, as in Ohio, a constitutionally created body, is not permitted to take into consideration the Voting Rights Act in the apportionment process unless the body, be it the legislature or the specifically designated body such as the governor, auditor of state, secretary of state and the two representatives from the General Assembly conduct a judicial like proceeding such as the case that gave rise to the *Armour decision*.[3] I again reject that proposition as unsound and not in keeping with precedent [4] or the legislative history of the Voting Rights Act.

Moreover, in this case, despite the sweeping language of the majority opinion, the recently filed fact findings of the defendants do address the creation on a specific basis the proposed majority-minority districts contained in the 1991 Apportionment Plan.

I commend my colleagues for the order to the extent it identifies for the citizens of Ohio the ramifications of its order today appointing a special master. As indicated, the May primary will not take place as scheduled unless a higher court should see fit to stay the majority's order. The General Assembly is now faced with the need to consider whether to move back the May primary until the designated date of June 2. However, the majority's opinion fails to address whether prospective candidates will be given an apportunity to file nominating petitions after the legislative boundaries are finally determined. Despite my commendation, I am apprehensive that the

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[3] 775 F. Supp. 1044 (N.D. Ohio 1991).

[4] *See Garza v. City of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). In *Garza*, the Court held that an apportionment Board has an obligation to reapportion when the districts do not meet the requirements based on the total population of the state divided by the number of districts designated in the state's constitution. A *failure* to reapportion, according to the Court, would be a violation of the Voting Rights Act.

work of the master and considerations of the challenges that are certain to flow from his recommendations place in jeopardy the revised date of June 2 for holding the primary for the General Assembly candidates.

I believe the order to the master also suffers from a lack of comprehensive instructions. The master is given no directions on the following issues.

1. What data base is the master to consider in responding to the reference? Is he to consider or ignore the extensive testimony received by the Apportionment Board as it conducted public hearings across the State of Ohio in 1991 before the 1991 apportionment plan was adopted? Is the master to ignore the Voting Rights Act in arriving at his recommendation? Is the master to conduct public hearings before making his recommendation?

2. The 1981 Apportionment Plan created four majority-Minority districts. The plan advanced in the 1991 Apportionment Plan as adopted calls for eight majority-minority districts. The plan advanced by the plaintiffs Quilter and Ferguson, also members of the Apportionment Board, proposed the creation of an additional two majority-minority districts. The rejection by the majority of this panel of the 1991 Apportionment Plan is anchored in the creation of the additional four districts without the requisite justification as deemed necessary by the majority. QUERY: Is the master free to recommend on this issue as to the number of majority-minority districts and, if so, based on what criteria? [5]

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[5] The Court notes that while the plaintiffs in this action criticized the defendants Voinovich, Taft and Aronoff, for creating eight majority-minority districts in compliance with the Voting Rights Act, the minority plan proposed by the Democrats contained two new majority-minority districts without even an attempt to make the fact findings the majority declares necessary to justify the creation of additional majority-minority districts.

3. How should the master consider and apply, if at all, the decision of the Ohio Supreme Court in its decision in the case of *Voinovich v. Ferguson* (1992) —— Ohio St. 3d —-? [6]

4. Should the master, as recommended by the defendants in its plan, create single county districts for the three counties of Fairfield, Wayne and Ashtabula, or disregard the discretionary decision of the defendants and adopt the view of the plaintiffs Ferguson and Quilter which declined to provide those three counties whole county district status? [7]

5. When is the master to report to this court? [8]

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[6] Justice Resnick of the Ohio Supreme Court authored a dissent in which she was critical of the 1991 Apportionment Plan as adopted by the three defendants Voinovich, Taft and Aronoff. The plaintiffs have seized upon the Resnick dissent and suggest that the 1991 Apportionment should be revisited in the context of the Resnick dissent. However, Justice Douglas' opinion is highly critical of the Resnick dissent and points out that the plaintiffs in this case, Ferguson and Quilter, declined to present the issues raised in the Resnick dissent. Consequently, significant issues of both collateral estoppel and abstention apply with respect to what consideration, if any, the Master is to give to the Ohio Supreme Court's decision in *Voinovich v. Ferguson.*

[7] See Article XI, § 10(B) which provides:

> Each county containing population between 90 and 95% of the ratio or between 105 and 110% of the ratio *may* be designated a representative district. (emphasis added)

[8] The plaintiffs filed in this case on March 10, 1992 a motion requesting this Court to order the Secretary of State to show cause why the Ohio Primary Election of May 5 should not be postponed pending the establishment of lawful legislative boundaries for the Ohio General Assembly. The Order of the Court approved by the majority of the panel inferentially addresses the motion by continuing the primary election for the Ohio General Assembly until June 2, 1992. As pointed out by the plaintiffs, Ohio Rev. Code § 3513.05(D), provides that *sixty* days before the primary date, the Secretary of State must "certify to each board [of elections] in the state the forms of the official ballots to be used at such primary

I have outlined some of the problems that the majority opinion creates to emphasize again the view that the responsible effort on the part of the defendants Voinovich, Taft and Aronoff to fairly reapportion the State of Ohio consistent with the provisions of the Ohio Constitution and the mandate of the Voting Rights Act does not warrant the majority's unprecedented judicial interference. Moreover, electoral chaos in Ohio for 1992 appears inevitable. I must respectfully dissent.

/s/ David D. Dowd, Jr.
DAVID . D. DOWD, JR.
U.S. District Judge

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election together with the names of the candidates to be printed thereon. . . ." (emphasis added).

The sixtieth day before June 2, 1992 is, by this Court's calculation, April 2, 1992. To meet that date and to allow time for candidates to file nominating petitions after the report of the Master is received and the Court hears objections thereto and enters a final order, it would appear that the Master's report should be filed with this Court by no later than March 16, 1992. Such a filing would give all interested parties seven days to file objections, i.e., by March 23, 1992 and then give this Court two days to respond by filing its final order on March 25, 1992. Under that scenario, prospective candidates would have until April 1, 1992 to file nominating petitions and the Secretary of State would have to respond under the provisions of O.R.C. 3513.05(D) by April 2, 1992.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91 CV 2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

FINDINGS OF FACT SUPPLEMENTAL MEMORANDUM OF LAW, AND ORDER

[Filed Mar. 19, 1992]

Pursuant to Fed. R. Civ. P. 62(c), Defendants have moved this Court to stay its Order of March 10, 1992 pending appeal to the United States Supreme Court. The Defendants attached a Memorandum in Support, and the Plaintiffs, pursuant to this Court's direction, have submitted a Memorandum in Opposition to Defendants' Motion to Stay Pending Appeal.

In our Opinion and Order decided and filed January 31, 1992 ("Opinion"), we noted that "[t]he exigencies of the situation, which include satisfying deadlines, have required counsel for the parties to formulate and present

their positions with commendable speed, and have similarly imposed upon this panel a mandate to record the conclusions reached as rapidly as possible." Opinion at 17 n.2. Nonetheless, this Court is fully aware of its obligation to make more detailed findings of fact and conclusions of law. Accordingly, this opinion and order has a dual purpose: to respond to the motion for stay pending appeal and to more fully develop our legal conclusions and the factual support therefor.

I.

Defendants' motion to stay the Opinion and Order of the Court dated March 10, 1992 is based upon the same flawed legal premises previously rejected by this Court. In the context of the four-part test for stays pending review, Defendants argue, once again, that that they may undertake to "remedy" unproven Voting Rights Act violations on a wholesale, statewide basis without performing a legally adequate totality-of-circumstances analysis; that Ohio should be treated for Voting Rights Act purposes as if it were a § 5 state; that this Court's opinions are contrary to the Supreme Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as well as "every decision issued regarding the creation of majority-minority districts," Memorandum in Support at 5; and that, unless the Court stays the effect of its order enjoining Ohio's May 5, 1992 primary, political chaos will erupt throughout the state. Each of these arguments is without legal foundation or factual support.

II.

There are two principal authorities to which this Court has directed the parties' attention. These are the legislative history of the Voting Rights Act as set forth in the Senate Report on that Act and the *Gingles* decision of the Supreme Court. With respect to the authoritative nature of the Senate Report, the Supreme Court has stated, "[w]e are not persuaded that the legislative history of

amended § 2 contains anything to lead us to conclude that this Senate Report should be accorded little weight. We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill." *Gingles*, 478 U.S. at 43 n.7. Although *Gingles* cannot be automatically applied outside the context of multimember districting schemes, *see, e.g., Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991), *Gingles* remains the Supreme Court's landmark opinion explaining § 2 of the Voting Rights Act; it has been cited in the briefs of both sides herein as controlling authority with regard to racial bloc voting.

Both *Gingles* and the Senate Report state that violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action. In this regard, the Court in *Gingles* stated:

> Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multimember district. By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the Court simply requires that § 2 plaintiffs prove their claim before they may be awarded relief.

Gingles, 478 U.S. at 48 n.15.

The Senate Report is equally clear, particularly with respect to proof concerning racial bloc voting:

> The results test *makes no assumptions one way or the other* about the role of racial political considera-

> tions in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.

S. Rep. No. 417, 97th Cong., 2d Sess. 34 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 212.

Defendants, as the majority of the Apportioning Board, have proclaimed their mission to be the remedying of purported previous Voting Rights Act violations. Nevertheless, the Board would exempt itself from the necessity of proving Voting Rights Act violations by conducting the "searching practical evaluation of past and present reality," *Armour*, 775 F. Supp. at 1049 (quotation taken from Senate Report at 30), required by the Senate Report and by *Gingles*. By exempting itself from the necessity of proof, the Board can thus ignore three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such candidates have been elected over a sustained period of time. Moreover, by exempting itself from the necessity of proof, the Board may, in the name of "remedy," pack black voters in urban areas and fragment them in suburban areas, politically segregating them and diluting their vote.

If the Board were correct in its premise that there is no legal requirement of proof before a "remedy" is applied, then in the hands of the Board, the voting Rights Act itself becomes a "device" to dilute the voting strength of the protected minority. All "devices," including sophisticated devices, were outlawed by Section 2 of the Act. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (noting that Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination").

Defendants, as well as the dissent from our January 31, 1992 Opinion and Order, distort this aspect of the

Court's opinion. They imply that this Court had held that an apportioning board must engage in a totality-of-circumstances analysis prior to any racially conscious redistricting. They similarly imply that this Court held that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation, unless it first analyzes the totality of the circumstances. Neither of these contentions is true.

This Court was not faced with mere race-conscious redistricting that sought to avoid the division of contiguous, cohesive concentrations of minorities. This Court was also not faced with a plan that simply created a substantial number of majority-minority districts without explanation. Finally, this Court was not faced with a state subject to § 5 of the Voting Rights Act, in which case the historical violation of minority rights has been conclusively established. Rather, this Court addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based on Ohio policy and law; rather, it contended that such a per se rule is mandated by federal law.

In this context, the dissent criticized our Opinion for focusing on the process of redistricting rather than its effects.[1] It is the process, however, that violates the text of the Voting Rights Act: "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1988). Although "neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment," the Supreme Court has upheld the creation of majority-minority districts only in the context

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[1] Focusing on the process, however, is entirely appropriate, because like the *Jeffers* court, *see infra* part III, we mandate no particular result.

of § 5 of the Act: "the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to assure that its reapportionment plan complies with § 5." *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144, 161 (1977). The implication is clear: the creation of majority-minority districts wherever possible is a remedy, not a right.

Nonetheless, this Court took a broad view of the Act. If officials of the state of Ohio seriously wish to concede that they have, in the past, intentionally and purposefully discriminated against minorities statewide, and that theirs is a state with a legacy of legally significant racial bloc voting, then this Court would be required to conclude that Congress had erred in excluding Ohio from the list of states subject to the Voting Rights Act. As discussed *infra* part III, this was essentially the approach of the court in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). If difficulty in electing candidates of choice and racial bloc voting are not proven, however, then the key elements upon which a "remedy" must be premised are missing. As the record demonstrates, legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice in *any* district other than the two districts (51 and 52) addressed by the court in *Armour*. There is simply no proof to support a finding of the inability of black voters either to elect candidates of their choice or to affect the election of candidates of their choice in given legislative districts.

Indeed, the issue here is not whether the Board should be permitted to redress proven wrongs, but instead, whether the Board should be permitted to destroy what is right in Ohio—that is, coalitional voting. As is shown by evidence introduced by both parties, the white crossover vote for black legislative candidates was very sub-

stantial, usually more than 50%.[2] Such voting is not legally significant racial bloc voting;[3] rather, it is coalitional voting, and this coalition of black and white voters is the target of the Board's plan. The Voting Rights Act

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[2] Instead of the racial bloc voting that the Defendants' contend has characterized House legislative races in which minorities were candidates, Dr. Henderson performed a bivariate analysis for the election years 1990, 1986, and 1984, showing that there was highly coalitional voting in each of those elections.

Minority Rep.	White Crossover Vote (%)
T. James	63.71
C. Prentiss	51.65
V. Whalen	67.55
W. Mallory	50.66
H. Rankin	50.93
R. Miller	44.50
O. Beatty	50.25
R. McLin	35.44
T. Roberts	45.98
V. Sykes	48.76
C. Jones	44.46

Dr. King, the Defendants' expert, criticized Dr. Henderson's analysis, and used a different approach, but nevertheless, Dr. King concluded that, on average in statewide races, 95% of blacks voted for black candidates and 56.7% of whites voted for black candidates and, thereby, confirmed Dr. Henderson's conclusions. Apportionment Board Hearing, February 11, 1992, at 48-49.

[3] Dr. King, however, like Mr. Tilling, chooses to ignore the *Gingles* qualifier "legally significant" and opines that there is polarized voting wherever blacks and whites differ in the amounts of their vote. Even so, King does not challenge Henderson's results. Dr. King's regression analysis reflects the average proportion of whites voting for black incumbents in the years 1980-1990 as follows: 1984—56.7%; 1986—60.2%; 1988—67.8%; and 1990—61.5%. Oddly, Dr. King finds racial bloc voting by subtracting the percent of white voters voting for black candidates from the percent of black voters for black candidates. Testimony of King, Feb. 18 Hearing at 48-49. Under this analysis, the only situation where racial bloc voting would not exist would be where black voters support black candidates in smaller numbers than white voters. *Id.*

was not designed to serve the purposes of preventing coalitional black and white voting.

While the Board argues that it should be found exempt from the necessity of a "totalities" analysis, its fallback position is that it has satisfied that analysis. It points to the "new" evidence that it has submitted. This new evidence, however, fails to connect the socioeconomic statistics presented to any proven inability of black voters either to elect or affect the election of candidates of their choice. Even in the unfortunate circumstances where blacks continue to suffer the social and economic effects of past discrimination, it must still be proven that there is a substantial inability to elect candidates in the areas at issue. *See Gingles*, 478 U.S. at 48 n.15. No such proof was even proffered by the Board.

III.

In its January 31, 1992 Order and Opinion, this Court stated, "[t]he language of § 2 of the Voting Rights Act contains no requirement for majority-minority districts," Opinion at 8, recognizing that, "where the creation of majority-minority districts wastes minority votes by packing and dilutes minority influence by fragmenting, the result is an 'abridgement of the right . . . to vote on account of race or color' which *violates* the Voting Rights Act," *id.* at 8-9 (emphasis added).

The Defendants originally relied on *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991) to support their per se approach.[4] Consequently, this Court reviewed *Gingles* and found "nothing in *Gingles* which establishes a *per se* requirement for the creation of majority-minority dis-

[4] On a number of occasions, Mr. James Tilling, allegedly speaking as the Board's agent, referred to *Armour*, *Gingles*, and the 1982 amendment to the Voting Rights Act to erroneously justify his belief that the Board Majority had a legal obligaiton to create majority-minority districts wherever possible.

tricts." Opinion at 10. This Court also reviewed *Armour* and concluded that "*Armour* does not stand for the proposition that persons responsible for apportionment should create majority-minority districts wherever possible." *Id.* at 11. Without distinguishing our reading of *Gingles* or *Armour*, the Board cites four cases that allegedly "require a state to affirmatively address the dilution of majority voting strength in the apportionment process whenever the opportunity to do so exists." Memorandum in Support at 5-6. These cases are: *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977); *Beer v. United States*, 425 U.S. 130 (1976); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991); and *Jeffers v. Clinton*, 730 F. *Supp.* 196 (E.D. Ark. 1989), *aff'd* mem., 111 S. Ct. 662 (1991). *United Jewish Organizations* and *Beer* are § 5 cases. *Garza* is a case in which there had been repeated intentional violations of the Fourteenth and Fifteenth Amendments. *Jeffers* is a case in which the court found a violation of § 2 of the Act and instituted creation of majority-minority districts as a *remedy*.

Ohio is not now, and has never been, subject to the preclearance requirements of § 5 of the Voting Rights Act. The Voting Rights Act was passed in 1965 because "[t]raditionally, black Americans were denied the franchise throughout the South." Senate Report, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 182. The Act operates on two levels: first, § 5 of the Act requires "covered jurisdictions" to preclear any changes in voting or election laws, and second, § 2 of the Act prohibits discriminatory practices nationwide. *Id.* at 5-6, *reprinted in* 1982 U.S.C.C.A.N. at 182-83. The § 5 "covered jurisdictions" were established in 1965, and the preclearance requirements were extended in 1969, 1970, and 1975, because Congress made "a careful review of the contemporaneous record of ongoing voting rights discrimination" in areas affected. *Id.* at 8-9, *reprinted in* 1982 U.S.C.C.A.N. at 185-86.

There is a profound and distinct difference between § 5 and § 2 of the Voting Rights Act. In § 5 localities, the inability of minorities to participate equally in electoral processes has already been proven by the legislative findings of Congress. Racial bloc voting and the inability to elect or affect the election of candidates of choices were proven; these were but two of the myriad of the proven elements that deprived blacks of their electoral franchise in these covered jurisdictions. Hence, these facts did not have to be proven under a totalities test in a § 5 area; they could properly be assumed. The "results" test of § 2, however, made no such assumptions. The Senate Report explains the necessity of examining local circumstances carefully and avoiding mechanistic rules:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

Id. at 31, *reprinted in* 1982 U.S.C.A.N. at 208.

States which are subject to § 5 of the Voting Rights Act must submit proposed apportionment plans for approval to the Attorney General or a three-judge court. 42 U.S.C. § 1973c. With respect to states subject to § 5, there has been a prior determination that the discriminatory voting practices of that state have been so substantial that future redistricting plans are automatically suspect and remains so until the Attorney General or a court approves the particular plan in question:

> It is evident that the Act's prohibition against instituting new voting procedures without the approval

> of the Attorney General or the three-judge District Court *is not dependent upon proving past unconstitutional apportionments* and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court.

Carey, 430 U.S. at 157 (emphasis added).

Those drafting an apportionment plan for a state subject to § 5 must operate upon the assumption that racially discriminatory practices or procedures with respect to voting rights exist or existed and, consequently, must draft the plan accordingly. Thus, it is proper, and in some instances required, that a § 5 state draw majority-minority districts without first determining whether a "searching practical evaluation of the past and present reality" supports such creation. In fact, the Supreme Court, in the context of § 5, stated: . .

> *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." This *test* was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented.

Id. at 159 (quoting *Beer v. United States*, 425 U.S. at 141) (emphasis added) (citations omitted). Although Defendants quote this language, they take it out of context by failing to note that the Court was specifically addressing § 5. The "test" referred to by the Court was the test articulated in *Beer*, where the Court was ad-

dressing a § 5 state's submission of its proposed plan for councilmanic districts for approval. "In *Beer v. United States*, 425 U.S. 130 (1976), the Court considered the question of what criteria a legislative reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the 'effect' of denying or abridging the right to vote on account of race." *Carey*, 430 U.S. at 159.

Garza, although it is not a § 5 case, has all of the earmarks of a § 5 case. There, the trial court found, and the court of appeals confirmed, that intentional discrimination had been practiced for decades against the Hispanic minority. *Garza*, 918 F.2d at 771. The Court found that, since at least 1959 and continuing in 1965, 1971, and 1981, Hispanic voters had been deliberately fragmented to dilute the effect of their vote on future elections, and that despite this evidence, the apportioning body had refused to draw the necessary majority-Hispanic district. *Id.* at 766-769. The court then accepted a plan that drew the required district.

In *Garza*, not only was the totalities test satisfied, but the even stricter test of *City of Mobile v. Bolden*, 446 U.S. 55 (1980)—intentional discrimination—had also been met. *See Garza*, 918 F.2d at 771. Accordingly, *Garza* does not stand for the proposition that a Board must draw majority-minority districts wherever possible, in the absence of conclusive proof of a Voting Rights Act violation. Rather, *Garza* indicates that such a district will be drawn by the court only where there is proof of intentional discrimination extending over many years.

In *Jeffers*, the court addressed a § 2 voting rights challenge. Nonetheless, even when promulgating its *remedy* for a *proven violation*, the court expressly disclaimed a contention that it was mandating the creation of any particular number of majority-minority districts:

> *We are not holding that the law requires the creation of any particular number of majority-black districts.*

> We know, and have found in this opinion, how many such districts can be created, and we also know that their lines can be drawn as to make them reasonably compact and contiguous. There is, therefore, a sort of presumption that any plan adopted should contain that number of majority black districts. There may be practical problems which we cannot foresee, though, and we are not foreclosing our duty to consider them after both sides submit their plans.

Jeffers, 730 F.Supp. at 217 (emphasis added). The *Jeffers* court not only expressly disclaimed the contention that it was requiring the creation of majority-black districts, it in fact found that the creation of majority-black districts was the only way to overcome the invidious racial discrimination existing in Arkansas' political and electoral processes. Indeed, it was the high degree of racial bloc voting present in Arkansas, outside Pulaski County, that caused the court to endorse the maximization of majority-minority districts:

> it is true here. . . . that there is racially polarized voting in races for the Arkansas State Legislature, that black voters usually vote cohesively, as a unit, and that white voters have the strength under the present plan of apportionment (except in majority-black districts) to enable them to frustrate the choices made by black voters.

Id. at 209 (citation omitted). Such racial bloc voting, warranting the per se creation of majority-minority districts, is not present in Ohio. Indeed, substantial coalition voting between the races exists in Ohio, where white crossover voting contributes to the election or reelection of all eleven of the black Ohio state legislators.

Contrary to this Court's recognition of the vital importance of following the proper process and avoiding the pitfalls of a per se application of majority-minority districting, the Board would arrogate to itself the unreview-

able discretion to determine where and to what extent there existed dilution of minority voting strength. With such unchecked power to determine dilution, an apportioning body, acting cynically, would be able to pack and fragment black voters at its political whim. Given the total absence of proof of legally significant racial bloc voting, the issue presented by the Board's argument is quite simple: whether an apportioning board should have unlimited discretion to apply the Voting Rights Act without a totalities analysis.

Gingles held that a trial court, in determining "whether the political process is equally open to minority voters," must (1) consider the "totality of the circumstances" and (2) conduct " 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 621 (1982)). If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," *id.*, it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. Whether such a Board is competent in the first instance to make the necessary totalities evaluation required by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.

Defendants have not and cannot cite to a single case, involving violations of § 2 of the Voting Rights Act, that stands for, or even lends support to, its proposition that federal law, in the absence of a proven § 2 violation, requires per se creation of majority-minority districts wherever possible. Furthermore, both of the § 5 cases cited by Defendants to support their per se approach were decided prior to the 1982 amendment to the Voting Rights Act, which together with its legislative history,

unambiguously sets forth the requirements for establishing a violation of § 2 of the Voting Rights Act.

The Defendants argue that this Court, itself, did not conduct a totalities evaluation to justify its finding that the Board violated the Voting Rights Act. This argument is rather clever sophistry. Having implemented the Voting Rights Act remedy in the absence of a violation, Defendants suggest that we are now required to establish a violation as a prerequisite to removing the remedy. Actually, however, this task is not as difficult as it seems. The totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population.[5] Against this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes[6]—exactly

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[5] There is only one district in the last twenty years that had more than thirty-five percent African-American population but did not elect an African-American. The exception was Senate District 25 in Cleveland, which elected Lee Fisher, subsequently and presently the elected Attorney General of Ohio. Thirty-five percent is considered adequate to elect a black person in Ohio because Ohio does not have the history of racial polarization in voting. Deposition of Horn at 98-99.

[6] Henderson states that the significance of the size of the white crossover vote in the 11 minority districts is important because it is clear evidence of coalitional voting, by which he means that a significant portion of white voters are willing to vote for the candidate of choice of black voters. Henderson states that the existence of substantial white crossover voting means that the plan drawer must take particular care to avoid packing of minority voting strength. Deposition of Henderson at 23. He also states that the size of the white crossover vote provides one measure or criterion by which you may assess what the dividing line is between packing and not packing minority voting strength. *Id.*

On this point, the dissent notes that "[b]y way of summary, the 1991 Apportionment Plan creates four (4) majority-minority districts in Cuyahoga County with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with a black population

what the Defendants intended. It is no defense to say that the concentration and dispersal of black voters is being done on a benevolent basis to guarantee the election of black candidates, as the Board would argue. The Board's argument is nothing less than an argument for proportional representation. Section 2 of the Voting Rights Act makes it clear that, the totality of the circumstances aside, nothing in that section "establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[7] 42 U.S.C. 1973(b).

Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally[8] and for po-

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of 74.80%, 90.05%, and 94.67%. The 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%." Dissent at 10.

First, both parties seem to agree with the changes Cuyahoga County. Second, the Defendants and the dissent constantly rely on these types of comparisons, yet they are not legally relevant. The 1981 apportionment of Cuyahoga County was never found to violate the Voting Rights Act. Similarly, the Democrats' proposed plan is irrelevant in this context for the simple reason that it is not, nor has it ever been, the apportionment plan of Ohio.

[7] Interestingly, Ohio is apparently unique in that proportional representation would be a step backward for African-Americans in Ohio, at least as far as the House is concerned. The black minority population in Ohio is predominantly located in its six major urban counties of Cuyahoga (24.9%), Franklin (15.9%), Hamilton (10.9%), Montgomery (17.7%), Summit (11.9%), and Lucas (14.8%). Those six counties account for approximately forty-four of the ninety-nine house districts and are presently represented by 11 minority representatives even though the total black population of the six counties (according to 1990 census figures) is only 19.1% of the total population of the six counties.

[8] Tilling states that, in the most populous counties, he drew boundaries in accordance with his understanding of the requirements of the Voting Rights Act first. Deposition of Tilling, 11/22/91, at 49. There were times when he would cross Ohio political boundaries in order to comply with his understanding of the

litical advantage[2] in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. *See Garza*, 918 F.2d at 771. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim. *See Armour*, 775 F. Supp. at 1060-61.

IV.

The Defendants, despite having had two opportunities to draw a lawful apportionment plan over a period of many months, have now asked the Court to stay its March 10, 1992 Order because they have not had a reasonable opportunity to adopt a substitute plan. Defendants tell only half the story by stating that this Court's order only gave them the opportunity to reconsider the plan to show justification for the creation of majority-minority districts. This Court ordered the Board to re-

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Voting Rights Act. *Id.* at 51-52. If there had been no Voting Rights Act requirement to create majority-minority districts, he understood that he would not have had to cross Ohio political boundaries. *Id.* at 52. He followed his understanding of the concept of federal supremacy and drew the lines as he perceived the Voting Rights Act required. *Id.*

[2] We offer the following as examples. Tilling had the "Republican Opportunities" document prior to his submission of the plan and while he was drawing the plan. Deposition of Tilling, 11/22/91 at 17-19. Henderson states that he considers Exhibit 11 to be a roadmap detailing how you create a racial gerrymander. Deposition of Henderson at 57. Robert Bennett, Chairman of the Ohio Republican Party, understood that creation of majority-minority districts would benefit Republicans. Deposition of Bennett, *passim*. On the "Let's Pretend" documents referring to Hamilton County, it states: "In this 'Republican' county the strategy is to 'pack' as much of the Democrat minority as possible into two heavily Democratic districts with black majorities." Deposition of Lawrence at 75-76. Mr. Horn's whole objective was to create what he was calling a Republican gerrymander. *Id.*

For incorporation of all these concepts, see generally Deposition of Horn, *passim*.

consider its plan, stating "[u]nless it can show justification under the totality of circumstances test for the present configuration, the Board must submit a revised plan to this court within 20 days of the date of this order." Opinion at 16. Thus, the Board had two options: (1) properly evaluate the totality of circumstances and, if the outcome justifies the plan's creation of majority-minority districts, submit that evidence to the Court or (2) submit a revised plan. The Board clearly chose option 1.

The Defendants' arguments for a stay, based on the assertions that the Court has misread, misapplied, and otherwise misinterpreted the basic law applicable to voting rights, do not support an optimistic view that the Defendants are now prepared to follow the Court's orders. Accordingly, the appointment of the Special Master was essential.[10]

Specifically addressing the criteria for a stay pending appeal, the only irreparable harm that the Defendants suggest would occur to them is that their plan may become moot because a lawful plan may be adopted consistent with the Court's order. This is not the sort of irreparable harm recognized in law. A party is not irreparably harmed if its unlawful plan is not implemented.

The Defendants also argue that the class of black voters who were both packed and fragmented by the Board's plan will not be injured, because they will in no way be prohibited from "effectively participating." Memorandum in Support at 18. If this means that black voters, like all other voters, will be entitled to vote, the argument begs the question. The right to vote encompasses the right not to have one's vote unlawfully diluted. The fol-

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[10] In response to the dissent, we note only that we know of no authority that requires this Court to delineate all of its instructions in the order appointing the Master, which history indicates is often self-defeating.

lowing excerpt from the Senate Report puts this right in the proper perspective:

> The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one-person, one-vote reapportionment case of *Reynolds* v. *Sims*. The Supreme Court based its ruling on the fundamental view that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."
>
> In defining the basic dilution principle, the Supreme Court observed:
>
> > "There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [t]he groups not in favor have their votes discounted."

Senate Report at 19, *reprinted in* 1982 U.S.C.C.A.N. at 196 (footnote omitted) (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 n.29, 562 (1964)).

The Defendants contend that the most significant harm occasioned by not granting a stay will be public uncertainty. Contrary to this suggestion, the confusion resulting from granting a stay would be far greater than the alternative of the orderly process put in place by this Court. This Court takes notice that, for reasons unrelated to this litigation, the congressional redistricting of the state of Ohio has not been concluded as of the time of this filing. Accordingly, the timetable established by the

Ohio statutes and required to be followed by the Secretary of State, Mr. Taft, a defendant herein, cannot be observed, and the May 5, 1992 primary election must be postponed, in any event, to a later date. Staying the Court's Order would not resolve the time pressures caused by this delay.

Moreover, the granting of a stay would arguably put the 1991 plan back into effect, since the 1992 plan is simply a "remedy" that was submitted to the Court and which has been rejected. If the proposed 1991 plan is put into effect, even greater confusion will follow. Setting aside the Court's order would expose the candidates and the public to the possibility that primary elections might be held in districts different from the general election. The unlawful nature of the 1991 legislative boundaries that were drawn on the basis of race is clear. The necessity of conducting elections within boundaries that are lawful can be achieved by following the process that the Court has in place. To abandon that process would require a determination that African-Americans must be concentrated in majority-minority districts wherever possible, a political theory finding support in neither the Voting Rights Act nor in decisions interpreting that Act. For the foregoing reasons, Defendants' Motion to Stay Pending Appeal is DENIED.

V.

As of the date of this opinion, a special master is in the process of drawing a constitutional plan for the State of Ohio. In this regard, the majority of this Court has issued a series of specific instructions, one of which involves the Fourteenth Amendment. In its present posture, this issue is moot, because Special Master Kane will comply with the Fourteenth Amendment. For purposes of completeness, however, we note that both the 1991 and 1992 plans violated the Fourteenth Amendment.

"The Equal Protection Clause requires that legislative districts be of nearly equal population, so that each per-

son's vote may be given equal weight in the election of representatives." *Connor v. Finch*, 431 U.S. 407, 416 (1977). The Supreme Court applies a 10% total deviation[11] rule; deviations in excess of that amount require justification by compelling, legitimate state interests. *See White v. Regester*, 412 U.S. 755, 776-77 (1973) (Brennan, J., dissenting) (stating the general rule that emerges from the majority's holding). Ordinarily, Ohio's provision of a plus or minus 5% *deviation* matches the requirement of a 10% *total deviation*.

The Apportioning Board, however, twice set aside the 5% standard. As the dissent notes in its findings regarding the apportionment process:

> single member county districts are mandated in the event the county's total population is with 5% of the ideal number. Four Ohio counties, Warren, Wood, Allen and Columbiana, fell within that computation for 1991. *The apportionment board may also create single member districts for counties with a total population that is within 10% of the ideal number.* The 1991 plan includes in that latter category an additional three counties, Fairfield, Wayne and Ashtabula.

Dissent at 7 (emphasis added).[12] The second violation occurred in Senate District 32, which has only 94.6% of the ideal district ratio.

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[11] Total deviation is arrived at by adding the percentage above the ideal district population of the most overpopulated district to the percentage below the ideal district population of the most underpopulated district. Thus, a districting criterion that allows a *deviation* of plus or minus 5% would, generally speaking, yield a *total deviation* of 10%. *See, e.g., Connor v. Finch*, 431 U.S. 407, 416-17 (1977) (finding that 8.2% above the norm and 8.3% below the norm yield a total deviation, or "maximum deviation from population equality," of 16.5%).

[12] Note, however, that the dissent misconstrues what the Supreme Court means by deviation. *See* Dissent at 18. A 10% deviation, of course, has the potential to yield a 20% total deviation.

Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized that, under the Fourteenth Amendment, standard districting criteria, such as respect for city or county boundaries, must give way to the equal population standard if there is an unavoidable conflict. *See, e.g., Jeffers v. Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989) ("The one-person, one-vote rule inevitably requires that county lines and natural barriers be crossed in some instances, and that cities and other political and geographic units be split in others."), *aff'd mem.*, 111 S. Ct. 662 (1991). Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
Circuit Judge

/s/ John W. Peck
JOHN W. PECK
Senior Circuit Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

NOTICE OF APPEAL

[Filed Mar. 11, 1992]

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Opinion and Order of January 31, 1992, and the Order of March 10, 1992. This appeal is taken pursuant to 28 U.S.C., § 1253.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Appeal in this case has been served by first-class United States mail service, postage prepaid, this 11th day of March 1992, upon the following Counsel of Record in this case.

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

STIPULATION

Pursuant to Supreme Court Rule 18.5, Plaintiffs and Defendants hereby stipulate that the portion of the appeal to the United States Supreme Court from the January 31, 1992 Order of the District Court shall be dismissed. The stipulation does not affect the appeal from March 10, 1992 Order.

So Stipulated:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following by telecopy and by Federal Express, this 19th day of March, 1992:

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APPENDIX G

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

NOTICE OF APPEAL

[Filed Mar. 25, 1992]

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Findings of Fact, Supplemental Memorandum of Law, and Order of March 19, 1992. This appeal is taken pursuant to 28 U.S.C. § 1253, and is in addition to the previous Notice of Appeal filed March 11, 1992 to the three-judge district court's Order of March 10, 1992.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et. al.*,
Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Notice of Appeal in this case has been served by first-class United States mail service, postage prepaid, this 25th day of March, 1992, upon the following Counsel of Record in this case.

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APPENDIX H

STATE OF OHIO

BEFORE THE PERSONS RESPONSIBLE	)
FOR APPORTIONMENT PURSUANT TO	)
ARTICLE XI. SECTION 1 OF THE	)
OHIO CONSTITUTION	)

FINDINGS AND CONCLUSIONS

In accordance with the order of remand of the Federal District Court, Northern District of Ohio, Eastern Division dated January 31, 1992, in *Quilter et al v. Voinovich, et al.*, Case No. 5:91CV-2219, the persons responsible for apportionment pursuant to Article XI, Section 1 of the Ohio Constitution hereby issue their Findings and Conclusions as follows:

FINDINGS

I. VOTING RIGHTS ACT/FIFTEENTH AMENDMENT

A. Adoption of the 1991 Apportionment Plan—Endorsement by Minority Groups

1. Pursuant to Article XI, Section 1 of the Ohio Constitution, the persons responsible for apportionment in 1991 are Governor George Voinovich, Secretary of State Robert Taft, II, Auditor Thomas Ferguson, Stanley J. Aronoff, President of the Ohio Senate, and Representative Barney Quilter. (Deposition of James R. Tilling, December 14, 1991, Defendants' Exhibit 96, TR. 8).[1]

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[1] All references to exhibits are references to the exhibits submitted in the record in *Quilter v. Voinovich et al.*, Case No. 5:91CV-2219 unless otherwise noted. These exhibits, together with additional exhibits concerning the "totality of circumstances test", were also admitted at the public hearing before the Board on February 11, 1992. The deposition of James R. Tilling taken on December 14, 1991 is submitted as Defendants' Exhibit 96. The deposition will, hereinafter, be referred to as "Defendants' Ex. 96".

2. On August 22, 1991, Mr. Tilling was designated Secretary to the persons responsible for apportionment. Mr. Tilling was directed by Governor Voinovich, Secretary Taft, and President Aronoff to draft the 1991 Apportionment Plan which was adopted by the persons responsible for apportionment. (Defendants' Ex. 96, TR. 7).

3. In drafting the 1991 Apportionment Plan, Mr. Tilling was instructed by Governor Voinovich, Secretary Taft, and President Aronoff to: (1) comply with the Ohio Constitution; (2) comply with the United States Constitution; and (3) comply with the Voting Rights Act. (Defendants' Ex. 96, TR. 23).

4. Mr. Tilling is Chief Executive Officer of the Ohio Senate and has been so employed since January, 1985. (Defendants' Ex. 96, TR. 4). Mr. Tilling has a B.S. degree in Social Sciences from Clarkson University, a Masters degree in political science from the University of Illinois, with a major in urban and metropolitan politics, and has completed course work toward a PhD. (Defendants' Ex. 96, TR. 5). Mr. Tilling is a former professor of political science at Ohio University where he taught from 1969 to 1976. (Defendants' Exhibit 96, TR. 6).

5. In 1981, Mr. Tilling led a bipartisan effort to prepare the 1981 Congressional redistricting plan. (Defendants' Ex. 96, TR. 10). Mr. Tilling's testimony concerning the 1981 Congressional plan was accepted by the Federal District Court in *Flanagan v. Gil[illegible]or*, 561 F.Supp. 36 (S.D. Ohio, 1982), where a three judge court upheld the 1981 Congressional plan against claims of racial discrimination.

6. In 1981, Mr. Tilling was actively involved in a proposed Ohio Constitutional amendment to provide for fair and impartial state apportionment. The proposed amendment, the "FAIR" proposal (Fair and Impartial Redistricting), was supported by the ACLU and the Council of Churches but was defeated at the polls. (Defendants' Ex. 96, TR. 11).

7. Mr. Tilling has served the last four years on the National Conference of State Legislators Task Force ("NCSL Task Force"), a bipartisan task force composed of representatives of all fifty states and designed to deal with apportionment issues. Mr. Tilling is currently Vice-Chair of that national task force. (Defendants' Ex. 96, TR. 9, 12).

8. In his involvement with the NCSL Task Force, Mr. Tilling has chaired panels on minority voting issues under the Voting Rights Act. Mr. Tilling has worked closely with Clifford Collins, Director of Voter Education of the NAACP, with James Daniels, State Chairman of the Ohio Conference of Branches of the NAACP, Frank Allison, President of the Cincinnati Branch of the NAACP, Fred Parker, President of the Columbus Branch of the NAACP, Floyd Johnson, State Coordinator for Ohio Apportionment, and other minority representatives. (Defendants' Ex. 96, TR. 14, 15 and 19). Mr. Tilling has also participated in regional conferences, sponsored by the NAACP, regarding minority voting issues. (Defendants' Ex. 96, Tr. 19). Mr. Tilling has also participated in panels, co-hosted by the United States Bureau of the Census, dealing with apportionment issues. (Defendants' Ex. 96, TR. 14.)

9. Mr. Tilling is Co-Chairman of the Ohio Legislative Task Force on Reapportionment, Redistricting and Demographic Research, a bipartisan effort to deal with technical issues in the 1991 apportionment, including collection and computerization of census data. (Defendants' Ex. 96, TR. 25).

10. The Ohio Legislative Task Force engaged Cleveland State University to prepare a "unified data base" for use by interested groups and the general public in the 1991 apportionment process. The unified data base included PL-94171 population counts, racial demographic data and election results for all 1990 statewide races and 1990 Ohio House and Senate races. Population data was

prepared by census tracts and ultimately converted to population data by wards and precincts. (Defendants' Ex. 96, TR. 24, 25 and 27).

11. All data created by Cleveland State University in the unified data base has been stipulated in this proceeding. (See Joint Stipulation).

12. The persons responsible for the 1991 apportionment first met on August 22, 1991. Thereafter, public hearings were held at fifteen sites throughout the State of Ohio over the ensuing two and one half weeks. The purpose of the public hearings was to obtain public comment, and particularly minority input, concerning the 1991 apportionment. Transcripts of the public hearings have been submitted as Joint Exhibits. (Defendants' Ex. 96, TR. 32, 33). This was the first time in Ohio history that such public apportionment hearings were held and that the public was given access to a data base and computer terminal.

13. On September 26, 1991, proposed apportionment plans were submitted by: (1) the majority of persons responsible for apportionment (Governor Voinovich, Senator Aronoff and Secretary of State Taft); (2) the minority of the persons responsible for apportionment (Auditor Ferguson and Representative Quilter); (3) the Ohio Conference of Branches of the NAACP; (4) the Black Elected Democrats of Ohio (BEDO); and (5) the Ohio Republican Party.

14. Defendants' Exhibit 1 (the "1991 Majority Plan") is the apportionment plan submitted by the majority of persons responsible for apportionment and adopted on October 1, 1991, amended on October 3, 1991 and published by the Governor on October 5, 1991. Defendants' Exhibit 76 is the apportionment plan submitted by the Ohio Conference of Branches of the NAACP. Defendants' Exhibit 77 is the plan submitted by BEDO. Defendants' Exhibit 78 (the "1991 Minority Plan") is the plan sub-

mitted by Messrs. Ferguson and Quilter on behalf of the Democrats. Defendants' Exhibit 79 is the plan submitted by the Ohio Republican Party. (Defendants' Ex. 96, TR. 34, 35).

15. The plan submitted by BEDO (Defendants' Ex. 77) and the plan submitted by Messrs. Ferguson and Quilter (Defendants' Ex. 78) are precisely the same plan. (Defendants' Ex. 96, TR. 36).

16. On September 30, 1991, the persons responsible for apportionment met to hear testimony from the various proponents of the plans. A transcript of the proceedings is submitted as a Joint Exhibit. (Defendants' Ex. 76, TR. 37).

17. On October 1, 1991, the persons responsible for apportionment met again to consider adoption of a final plan of apportionment. The meeting was recessed from time to time to permit discussions among representatives of BEDO and the NAACP and Mr. Tilling to attempt to reach a consensus concerning minority districts (Defendants' Ex. 96. TR. 39). A transcript of these proceedings is also submitted as a Joint Exhibit.

18. The above-referred discussions were initiated by Mr. Tilling after representatives of BEDO and the NAACP failed to reach a consensus regarding minority districts. Mr. Tilling contacted Congressman Stokes to attempt to bring the minority groups together. Tilling initiated these discussions since he knew that minority voting issues would be the focal point of the apportionment process. (Defendants' Ex. 96, TR. 39, 42).

19. Floyd Johnson represented the NAACP in these discussion. Mr. Johnson has worked for the NAACP for the last twenty-five (25) years. Mr. Johnson is Chairman of the Dayton Political Action Committee of the NAACP and is State Coordinator For Reapportionment and Redistricting for the Ohio Conference of Branches of

the NAACP. Mr. Johnson was appointed to the latter position by James Daniels, President of the Ohio Conference of Branches of the NAACP. (Deposition of Floyd Johnson, December 10, 1991, Defendants' Exhibit 97, TR. 6, 7).[2]

20. Floyd Johnson is a long-standing civil rights activist. Mr. Johnson began registering minority voters in 1963, when he registered his father to vote. Mr. Johnson also assisted the late Representative C.J. McLin in every voter registration drive he conducted. (Defendants' Ex. 97, TR. 6). Mr. Johnson has been involved with the Congress of Racial Equality, the Non-Violent Coordinating Committee, the Dayton Alliance For Racial Equality and the Democratic Voters League. (Defendants' Ex. 97, TR. 11-12). Mr. Johnson has been actively involved in minority voting issues since the passage of the Voting Rights Act of 1965. He has attended workshops and conventions sponsored by the NAACP, regarding minority voting issues. (Defendants' Ex. 97, TR. 13). Mr. Johnson has been an active Democrat since 1960 and has run for a house seat in Montgomery County on two occasions. (Defendants' Ex. 97, TR. 12, 14, 15).

21. Mr. Johnson prepared the proposed apportionment plan submitted by the Ohio Conference of Branches of the NAACP. As stated, Mr. Johnson was the State Coordinator For Real Reapportionment and Redistricting for the Ohio Conference of Branches. Mr. Johnson reported to the State Committee, composed of all presidents of the local branches of the NAACP. The most active members were Frank Allison of the Cincinnati branch,

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[2] The deposition of Floyd Johnson taken on December 10, 1991 is submitted as Defendants' Exhibit 97. The deposition will be hereinafter referred to as Defendants' Ex. 97. Mr. Johnson testified at the February 11, 1992 Apportionment Board hearing, where he reaffirmed his deposition testimony and offered further supporting testimony on the "totality of circumstances test." (Transcript of Board Hearing, February 11, 1992, TR 61-76).

Fred Parker of the Columbus branch, Jesse Gooding of the Dayton branch and James Daniels, President of the Ohio Conference of Branches of the NAACP. (Defendants' Ex. 97, TR. 15).

22. BEDO was represented in the discussions of October 1, 1991 by Dana Mattison, its Executive Director. (Deposition of Dana Mattison, November 26, 1991, defendants' Exhibit 82, TR. 1).[3]

23. During the evening of October 1, 1991, BEDO, the Black Elected Democrats of Cleveland, Ohio ("BEDCO") and the NAACP reached a consensus regarding the establishment of minority districts in Cuyahoga County in the final 1991 apportionment plan. The NAACP accepted BEDO's proposal for Cuyahoga County, establishing four majority-minority districts and one influence district in Cleveland. Mr. Tilling accepted the NAACP's recommendations for all minority districts in the remainder of the State. Mr. Tilling reviewed the proposals and accepted the same. (Defendants' Ex. 96, TR. 40, 49).

24. On October 1, 1991, BEDO offered the consensus position with regard to the districts in Cuyahoga County as an amendment to the BEDO plan (referred to herein as the "BEDO Amendment"). The BEDO Amendment was also offered as an amendment to the plan proposed by the majority of persons responsible for apportionment. (Defendants' Ex. 96, TR. 41). The amendment was accepted by the majority of persons responsible for apportionment and incorporated in the final 1991 Apportionment Plan. (Defendants' Ex. 96, TR. 40).

25. At the meeting of October 1, 1991, Dana Mattison and Senator Jeff Johnson endorsed the 1991 Apportionment Plan as respects Cuyahoga County. Floyd Johnson, on behalf of the NAACP, endorsed the entire 1991 Ap-

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[3] The deposition of Dana Mattison taken on November 26, 1991 is submitted as Defendants' Exhibit 82 and is hereinafter referred to as Defendants' Ex. 82.

portionment Plan. (Defendants' Ex. 96, TR. 40; Deposition of Floyd Johnson, Defendants Ex. 97, TR. 58; Transcript of Board Hearing, February 11, 1992; TR. 68; Deposition of Dana Mattison; Defendants' Ex. 82, TR. 83-89; Record of Public Hearing of October 1, 1991, TR. 26, submitted as a Joint Exhibit).

26. The BEDO Amendment was endorsed by William Mallory, President of BEDO and Congressman Stokes. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 89, 90). Defendants' Exhibit 24 is a letter from William Mallory to James Tilling dated October 1, 1991, confirming BEDO's support for the BEDO Amendment. (Defendants' Ex. 96, TR. 114).

27. The BEDO Amendment was also supported by Dr. Larry Brisker, consultant for minority interests to both BEDO and the Defendants (Plaintiffs' Ferguson and Quilter). Defendants' Exhibit 25 is a letter dated October 1, 1991 from Dr. Brisker to James Tilling supporting the BEDO Amendment. (Defendants' Ex. 96, TR. 114).

28. On October 12, 1991, the Ohio Conference of Branches of the NAACP unanimously endorsed the 1991 Apportionment Plan. (Deposition of Floyd Johnson, Defendants' Ex. 82, TR. 58).

29. In short, the 1991 Apportionment Plan, as respects minority districts, is fully endorsed by the Ohio Conference of Branches of the NAACP and is endorsed for Cuyahoga County by BEDO, BEDCO, Dr. Brisker, the minority consultant to Plaintiffs' Ferguson and Quilter, and Congressman Stokes of the 21st Congressional Caucus.

B. Detail of the 1991 Apportionment Plan

I. *Ohio Constitutional Requirements*

30. Defendants' Exhibits 10, 11 and 12 are copies of the relevant provisions of Article XI of the Ohio Constitution. (Defendants' Ex. 96, TR. 50-53). The Ohio

Supreme Court in *Voinovich v. Ferguson* (1992), —— Ohio St. 3rd —— held that the 1991 Apportionment Plan complies with Article XI of the Ohio Constitution.

Article XI, Section 10 addresses the creation and numbering of House Districts. Article XI, Section 10 provides:

> § 10 [Creation and numbering of house of representative districts.]
>
> The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representative districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:
>
> (A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.
>
> (B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.
>
> (C) Proceding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining territory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.
>
> (D) The remaining territory of the state shall be combined into representative districts. (As enacted

Nov. 7, 1967. Former § 10 repealed, see SJR 24, 107th General Assembly.)

Article XI, Section 10(A) and (B) first address the creation of whole county districts, that is districts to be created from a single county. Article XI, Section 10(C) then addresses the division of counties with more than one whole house ratio into districts, proceeding from the largest to the smallest county. Article XI, Section 10(D) then addresses the apportionment of the remainder of the State. (Defendants' Ex. 96, TR. 53).

32. In drafting the 1991 Apportionment Plan, Mr. Tilling followed the requirements of Article XI, Section 10 of the Ohio Constitution. (Defendants' Ex. 96, TR. 56).

33. Article XI, Section 7(D) addresses the possible retention of districts established in the preceding apportionment. Article XI, Section 7(D) provides:

> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted *to the extent reasonably consistent* with the requirements of Section 3 of this Article.
>
> (Emphasis added)

34. In drafting the 1991 Apportionment Plan, Mr. Tilling complied with the requirements of Article XI, Section 7(D). (Defendants' Ex. 96, TR. 142-143).

35. Article XI, Section 3 of the Ohio Constitution provides the population requirements of any house district. Article XI, Section 3 provides:

> The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a

population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with Section 9 of this Article.

(Defendants' Ex. 10)

36. The ideal house of representatives population pursuant to Article XI, Section 3 of the Ohio Constitution is 109,567. (Defendants' Ex. 96, TR. 56).

37. Defendants' Exhibit 2 is a map of the Ohio house districts as configured in the 1981 apportionment. (Defendants' Ex. 96, TR. 50-53).

38. Defendants' Exhibit 3 is a map of the Ohio senate districts as configured in the 1981 apportionment. (Defendants' Ex. 96, TR. 50-53).

39. Defendants' Exhibit 4 is a map of the Ohio house districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, TR. 50-53).

40. Defendants' Exhibit 5 is a map of the Ohio senate districts as configured in the 1991 Apportionment Plan as adopted (Defendants' Ex. 96, Tr. 50-53).

41. Defendants' Exhibit 6 is a colorized map showing Ohio house districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, TR. 50-53).

42. Defendants' Exhibit 7 is a colorized map showing Ohio senate districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, Tr. 50-53).

43. Defendants' Exhibit 8 is a colorized map showing Ohio house districts as proposed by Plaintiffs' Ferguson and Quilter in the 1991 Minority Plan as proposed. (Defendants' Ex. 96, TR. 50-53).

44. Defendants' Exhibit 9 is a colorized map showing Ohio senate districts as proposed by Plaintiffs Ferguson and Quilter in the 1991 Minority Plan as proposed. (Defendants' Ex. 96, Tr. 50-53).

45. Defendants' Exhibit 57 displays the 1981 house districts with 1990 census population. This exhibit demonstrates that the vast majority of the 1981 districts must be reconfigured because the population of such districts fails to satisfy Article XI, Section 3 of the Ohio Constitution.

46. Defendants' Exhibit 13 provides the population for each house and senate district as established in the 1991 Apportionment Plan. With the exception of H.D. 68 and S.D. 32, which will be discussed, each house and senate district complies with the population requirements of Article XI, Sections 3, 4 and 9 of the Ohio Constitution. (Defendants' Ex. 96, Tr. 56).

47. Defendants' Exhibit 14 provides the population of each house and senate district as proposed by Messrs. Ferguson and Quilter in the 1991 Minority Plan as proposed. (Defendants' Ex. 96, TR. 56).

48. Defendants' Exhibit 54 displays the 1981 senate districts with 1990 census populations. (Defendants' Ex. 96, TR. 78).

49. Defendants' Exhibit 55 displays the 1990 populations for 1991 senate districts as configured in the 1991 Apportionment Plan as adopted. (Defendants' Ex. 96, Tr. 79). Defendants' Exhibit 56 displays the same information for senate districts as proposed by Messrs. Ferguson and Quilter in the proposed 1991 Minority Plan. (Defendants' Ex. 96, TR. 79).

50. Pursuant to Article XI, Section 10(C), Mr. Tilling proceeded to create districts from whole counties in the following order: Cuyahoga, Franklin, Hamilton, Summit, Lucas, Stark and Mahoning Counties. (Defendants' Ex.

96, Tr. 61). There is no dispute concerning this order of procession in creating house districts.

2. *Population Requirements of Major Urban Counties*

51. As indicated in the 1990 census, the total population of Ohio remained at approximately 10 million people, virtually the same as in the 1980 census. Ohio experienced only a net gain of population of 50,000 people. However, there were significant population shifts within the state. Specifically, there occurred a substantial shift in population from the Northeast quadrant of the state to the Central and Southwest portions of the state, particularly to Franklin, Delaware, Union and Madison counties. There also occurred a population shift from Cincinnati and Hamilton County to Butler, Clermont and Warren counties. Cuyahoga County lost one entire house district in population (109,000 people) while Franklin County gained one entire house district. Franklin County replaced Hamilton County as the second most populous county in the state. There were also significant population shifts from the inner cities to the suburbs. (Defendants' Ex. 96, Tr. 61-63).

52. As a result of major population shifts within counties and from the inner city to the suburbs, the vast majority of the 1981 configured districts in all major urban areas had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution. Defendants' Exhibit 58 displays the 1981 house districts with 1990 census population with an explanation of whether the district meets the requirements of Article XI, Section 3, is too high or is too low. (Defendants' Ex. 96, TR. 79). Defendants' Ex. 58 indicates the following:

1981 APPORTIONMENT HOUSE DISTRICTS WITH 1990 CENSUS POPULATION FOR MAJOR URBAN COUNTIES

ARTICLE XI, SECTION 3 IDEAL HOUSE DISTRICT POPULATION—109,567 RANGE—104,089-115,045			ARTICLE XI, SECTION 3 REQUIREMENTS
		CUYAHOGA COUNTY	
6	113,674		Meets requirements
7	107,304		Meets requirements
8	100,798		Too low
9	100,461		Too low
10	108,686		Meets requirements
11	96,086		Too low
12	84,098	(James)	Too low
13	104,883		Meets requirements
14	91,972	(Prentiss)	Too low
15	99,173		Too low
16	96,258	(Whalen)	Too low
17	107,097		Meets requirements
18	101,314		Too low
19	100,333		Too low
		HAMILTON COUNTY	
20	122,802		Too high
21	99,465		Too low
22	108,124		Meets requirements
23	97,630	(Mallory)	Too low
24	102,789		Too low
25	99,765	(Rankin)	Too low
26	119,239		Too high
27	116,413		Too high
		FRANKLIN COUNTY	
28	116,369		Too high
29	106,537	(Miller)	Meets requirements
30	118,913		Too high
31	97,764	(Beatty)	Too low
32	111,070		Meets requirements
33	115,186		Too high
34	138,011		Too high
35	157,601		Too high

ARTICLE XI, SECTION 3 IDEAL HOUSE DISTRICT POPULATION—109,567 RANGE—104,089-115,045			ARTICLE XI, SECTION 3 REQUIREMENTS
		MONTGOMERY COUNTY	
36	115,907	(McLin)	Too high
37	108,769	(Roberts)	Meets requirements
38	116,087		Too high
39	106,321		Meets requirements
40	118,434		Too high
		SUMMIT COUNTY	
41	107,879		Meets requirements
42	105,536	(Sykes)	Meets requirements
43	108,031		Meets requirements
44	113,743		Meets requirements
		LUCAS COUNTY	
45	107,825	(Jones)	Meets requirements
46	108,701		Meets requirements
47	102,736		Too low
48	121,371		Too high

53. As indicated in Defendants' Exhibit 58:

a) Nine (9) out of the fourteen (14) districts in Cuyahoga County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 8, 9, 11, 12, 14, 15, 16, 18 and 19. These districts include all districts represented by minority incumbents (H.D. 12 (James), 15 (Prentiss) and 16 (Whalen)). The remaining districts (H.D. 6, 7, 11, 13 and 17) cannot be retained intact given the population requirements of the other districts. (Defendants' Ex. 96, Tr. 91).

b) Seven (7) out of the eight (8) districts in Hamilton County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 20, 21, 23, 24, 25, 26, and 27. These districts include the two districts represented by minority incumbents (H.D. 23 (Mallory) and H.D. 24 (Rankin)). The remaining district (H.D. 22) cannot be retained intact because of the population requirements of the other districts. (Defendants' Ex. 96, Tr. 83).

c) Six (6) out of the eight (8) districts in Franklin County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 28, 30, 31, 33, 34 and 35. These districts include the district represented by minority incumbent Otto Beatty (H.D. 31). The two remaining districts cannot be retained intact because of the population requirements of the other districts. (Defendants' Ex. 96, TR. 84-86).

d) Three (3) out of the five (5) districts in Montgomery County must be reconfigured to meet the population requirements of Article XI, Section 3. These districts are H.D. 36, 38 and 40. These districts include the district represented by minority incumbent McLin (H.D. 36). The remaining dis-

tricts cannot be retained intact because of the population requirements of the other districts. (Defendants' Ex. 96, Tr. 87-88).

e) In Summit County, all districts (H.D. 41-44) meet the population requirements of Article XI, Section 3. These districts were reconfigured to avoid splitting the black community in Summit County and to avoid minority voter dilution. (Defendants' Ex. 96, TR. 89).

f) In Lucas County, two (2) out of four (4) districts do not meet the requirements of Article XI, Section 3. These districts are H.D. 47 and 48. The remaining districts, including H.D. 45 represented by minority incumbent Jones, cannot be retained intact because of population requirements of other districts and to avoid minority voter dilution. (Defendants' Ex. 96, TR. 89-90).

3. *Reconfiguration of Minority Districts-Voting Rights Act Considerations*

54. Defendants' Exhibits 15, 16 and 17 are comparisons of black population by district as configured in the 1981 apportionment, the 1991 Apportionment Plan (the 1991 Majority Plan) and the 1991 apportionment plan as proposed Messrs. Ferguson and Quilter and BEDO (the 1991 Minority Plan). Defendants' Exhibit 17 is a comprehensive comparison of all these apportionment plans. The percentages are based on both black population and black voting age population. (Defendants' Ex. 96, TR. 59). Defendants' Exhibit 17 indicates the following:

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 1991 MAJORITY APPORTIONMENT PLAN AND 1991 MINORITY APPORTIONMENT PLAN

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
6-19 Cuyahoga	**8-20 Cuyahoga**		**6-18 Cuyahoga**	
16—94.67% [1]	10—63.42% [2]	67.35% [1]	12—67.08% [2]	70.81% [1]
14—90.05%	12—65.13%	67.25%	16—66.67%	69.17%
12—74.80%	8—61.41%	65.64%	14—63.71%	68.20%
15—34.80%	9—58.36%	62.30%	13—60.18%	63.86%
17—26.14%	11—40.61%	43.01%	15—26.46%	27.89%
18—14.70%	14— 6.86%	7.92%	11— 7.32%	8.54%
19—14.40%	19— 3.71%	4.63%	18— 6.03%	6.87%
13— 4.99%	15— 3.25%	3.29%	9— 5.14%	6.05%
11— 4.44%	17— 2.34%	2.85%	17— 2.97%	3.12%
9— 4.16%	13— 2.32%	2.75%	7— 2.19%	2.62%
7— 2.36%	18— 1.31%	1.41%	8— 1.16%	1.23%
8— 2.12%	16— 0.45%	0.47%	10— 0.49%	0.66%
10— 0.64%	20— 0.23%	0.31%	6— 0.44%	0.47%
6— 0.49%				
28-35 Franklin	**21-29 Franklin**		**19-26 Franklin**	
31—46.80%	21—50.30%	55.92%	21—50.60%	53.85%
29—38.50%	22—44.31%	48.29%	19—46.40%	50.80%
32—26.60%	26— 8.07%	8.66%	20—10.88%	12.45%
30—12.40%	25— 7.96%	8.41%	22— 6.61%	7.04%
28— 5.90%	23— 7.78%	8.32%	26— 5.23%	5.99%
34— 5.10%	29— 4.47%	4.32%	24— 4.15%	5.08%
33— 4.10%	24— 3.92%	4.22%	23— 4.78%	4.79%
35— 1.40%	28— 3.56%	3.75%	25— 1.49%	1.62%
	27— 3.09%	3.57%		
20-27 Hamilton	**30-37 Hamilton**		**27-34 Hamilton**	
25—53.20%	30—56.83%	61.07%	28—57.91%	61.26%
23—45.90%	31—52.60%	59.82%	33—47.10%	55.49%
24—32.30%	32—21.58%	24.00%	34—19.55%	21.67%
22—12.60%	35— 7.91%	8.96%	32—16.71%	18.46%
27—12.20%	33— 7.50%	8.04%	31— 3.55%	4.39%
20— 8.90%	36— 4.08%	4.49%	30— 3.26%	3.96%
21— 7.50%	37— 1.94%	2.14%	27— 3.11%	3.46%
26— 2.70%	34— 1.90%	2.14%	29— 2.30%	2.53%

[1] Black percentage of total population

[2] Black Voting Age Population

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 1991 MAJORITY APPORTIONMENT PLAN AND 1991 MINORITY APPORTIONMENT PLAN (CONTINUED)

1981 Democrat Plan	1991 Majority Plan		1991 Minority Plan	
36-40 Montgomery	38-43 Montgomery		35-39 Montgomery	
36—42.10%	38—50.70%	54.78%	36—45.26%	47.63%
37—36.10%	39—29.23%	32.35%	37—36.20%	40.79%
40— 6.20%	43— 3.61%	3.86%	35— 3.62%	4.23%
39— 4.70%	40— 2.84%	3.30%	39— 2.71%	3.21%
38— 0.91%	42— 2.28%	2.76%	38— 0.99%	1.09%
	41— 1.18%	1.31%		
41-44 Summit	44-48 Summit		40-43 Summit	
42—35.40%	44—39.52%	43.26%	42—43.09%	47.20%
44— 9.00%	45— 5.40%	6.29%	41— 3.81%	4.25%
43— 2.90%	47— 5.00%	6.00%	43— 2.54%	2.88%
41— 2.30%	46— 1.12%	1.33%	40— 2.24%	2.54%
	48— 0.61%	0.53%		
45-48 Lucas	49-52 Lucas		44-47 Lucas	
45—41.70%	49—47.65%	50.92%	45—44.98%	50.12%
47—13.20%	52— 4.85%	5.65%	46— 4.70%	5.73%
46— 5.30%	50— 4.23%	5.46%	47— 4.16%	5.22%
48— 2.80%	51— 2.18%	2.40%	44— 3.02%	3.34%
49-51 Stark	54-57 Stark		48-50 Stark	
50—14.90%	54—12.93%	15.15%	50—12.49%	14.49%
49— 4.43%	55— 3.39%	3.84%	49— 3.43%	3.84%
51— 1.30%	57— 2.64%	2.98%	48— 3.08%	3.52%
	56— 1.15%	1.20%		
52-53 Mahoning	64-65 Mahoning		55-56 Mahoning	
53—27.80%	64—31.19%	35.53%	55—31.19%	35.53%
52—10.50%	65— 1.48%	1.64%	56— 1.44%	1.60%
Total (Minority Districts Over 10%)				
24	16	16	18	18
Total (Minority—Majority (Over 50%))				
4	8	9	6	9

55. In Cuyahoga County, the 1991 Apportionment Plan has four (4) majority-minority districts with a black voting age population of 58.36%, 61.41%, 65.13% and 63.42%. The prior 1981 districts had only three (3) majority-minority districts with black population of 74.80%, 90.05% and 94.67%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter similarly has four majority-minority districts with black voting age populations of 60.18%, 63.71%, 66.67% and 67.08%. (Defendants' Ex. 17).

56. Additionally, the 1991 Apportionment Plan creates a strong influence district in Cuyahoga County of 40.61% compared to an influence district of only 26.46% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. (Defendants' Ex. 17).

57. As discussed above, BEDO and the NAACP have both endorsed the 1991 Apportionment Plan as respects Cuyahoga County. BEDO Executive Director Dana Mattison supports the 1991 Apportionment Plan for Cuyahoga County given racial bloc voting in the county, the major population drifts from the inner city to the suburbs of Cleveland and low minority voter turnout in Cleveland. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 14-16).

58. In Franklin County, the 1991 Apportionment Plan has one (1) majority-minority district at 50.30% black voting age population where none existed in the 1980 apportionment. The 1991 Apportionment Plan also has a strong influence district at 44.31%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter also has one (1) majority-minority district at 50.60% black voting age population and one influence district at 46.40%. (Defendants' Ex. 17). Significantly, part of the rationale of increasing relative black percentages in Franklin County house districts from the 1981 plan was to create a Senate influence district in Franklin County. (Deposition of Tilling, Defendants' Ex. 96, TR. 103).

59. BEDO specifically recommended an *increase* from the 1981 Plan in black population percentages in the two districts in Franklin County currently represented by Representatives Miller and Beatty to avoid minority vote dilution under the Voting Rights Act. Mr. Mattison testified:

> Q. So you increased Ray Miller's district more than the majority did in adopting the 91 plan?
>
> A. In this particular case.
>
> Q. Well, tell me generally why you went from 38 to 50 percent in Ray Miller's district?
>
> A. Well again we looked at the totality of circumstances, looked at a number of issues and came to the conclusion that these were the figures necessary again to comply with our understanding of the Voting Rights Act.
>
> (Deposition of Dana Mattison, December 11, 1991, Defendants' Ex. 98, TR. 58).[4]

60. In Hamilton County, the 1991 Apportionment Plan creates two (2) majority-minority districts where only one existed in the 1981 apportionment. The majority-minority districts in the 1991 Apportionment Plan have a black voting age population of 52.60% and 56.83%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter also reflects one (1) majority-minority district at 57.91%. The 1991 Apportionment Plan also reflects an influence district of 21.58% compared to 19.55% in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter.

61. BEDO supported an *increase* in black population in both districts represented by minority incumbents, Representatives Mallory and Rankin, even though these incumbents have been elected over the years.

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[4] The deposition of Dana Mattison taken December 11, 1991 is submitted as Defendants' Ex. 98.

Q. Now going back to Hamilton County just briefly, for a second, same situation. Rankin and Mallory have been representatives elected over a long period of time and yet you increased the percentage of black population.

A. Uh-hum.

Q. Why is that?

A. Again, this is an individual district by district examination. We believe that communities respond differently based on a whole range of circumstances. Again, understand that Representative Rankin came to that district after her husband passed away, and there is a long-standing relationship with voters, but that does not mean that the trends indicate that that's going to continue over time, *and what we tried not to do was to construct districts based on incumbents. That's just not the reasonable thing to do.*

(Emphasis added; Deposition of Mattison, Defendants' Ex. 98, TR. 72)

62. In Montgomery County, the 1991 Apportionment Plan reflects one (1) majority-minority district where none existed in the 1981 apportionment. The 1991 Apportionment Plan has a district with a black voting age population of 50.70% and an influence district at 29.23%. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter has no majority-minority districts and two influence districts at 36.20% and 45.26%. (Defendants' Ex. 17).

63. In Montgomery County, Representative McLin's district (H.D. 36) exceeds the population requirements of Article XI, Section 3 of the Ohio Constitution. However, blacks are migrating from Representative McLin's district to Representative Robert's district so that, over time, McLin's district will lose black population and Robert's district will gain black population. Mr. Tilling recognized this population drift in his configuration of

districts in Montgomery County. (Defendants' Ex. 96, TR. 87).

64. Both BEDO and the Minority (Ferguson and Quilter) also recognized these population shifts in configuring districts in Montgomery County in their respective plans. (Deposition of Mattison, Defendants' Ex. 98, TR. 70).

65. Floyd Johnson, representing the NAACP, endorsed the 1991 Apportionment Plan as respects the configuration of all the minority districts in the 1991 Apportionment Plan, specifically those minority districts in Montgomery County. Mr. Johnson acknowledged that population shifts in Montgomery County required increases in black population in Representative McLin's district in order to maintain McLin's district as a minority district. Further, with the construction of the Trotwood corridor in the construction of Highway 35, black population would be displaced from Representative McLin's district. (Deposition of Johnson, Defendants' Ex. 82, TR. 46-48).

66. In Summit County, the 1991 Apportionment Plan reflects a slight increase in black population in H.D. 42, the district currently represented by minority incumbent Representative Sykes. The increase is from 35.40% to 43.26% black population. The 1991 Minority Plan proposed by Messrs. Ferguson and Quilter also increases the black population in Representative Sykes' district from 35.40% to 47.20%. (Defendants' Ex. 17).

67. Mr. Tilling increased black population in Representative Sykes' district to avoid minority voter dilution since the district is losing black population. (Defendant's Ex. 96, TR. 89). This was endorsed by Floyd Johnson for the NAACP. (Deposition of Johnson, Defendants' Ex. 82, TR. 50). BEDO also increased the percentage of black population in Sykes' district from 35.40% to 47.20% based on the same analysis. (Deposition of Mattison, Defendants' Ex. 98, TR. 74).

68. In Lucas County, the 1991 Apportionment Plan also reflects an increase in black population in H.D. 45, the district currently represented by minority incumbent Representative Casey Jones. The black voting age population in Jones' district was increased to 47.65% compared to 44.98% in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter as proposed. (Defendants' Ex. 17). While Plaintiffs challenge House Districts 45 and 47 in Lucas County, the black populations in these districts are substantially similar in the 1991 Apportionment Plan and in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter.

69. BEDO's plan increased the black population in Representative Jones' district due to population shifts in the district and because an expansion of the University of Toledo will displace black population. (Deposition of Mattison, Defendants' Ex. 98, TR. 80). Mr. Tilling employed the same rationale to the configuration of this district in Lucas County in the 1991 Apportionment Plan. (Defendants' Ex. 96, TR. 89-90).

70. In Stark County, there is not sufficient black population to form a majority-minority district and there are no material differences in the configuration of districts in any plan. (Defendants' Ex. 17).

71. The districts in Mahoning County are configured pursuant to the order of the Federal District Court in *Armour v. State of Ohio*, No. 88-1104Y (N.D.Ohio Sept. 4, 1991).

72. Overall, there are eight (8) majority-minority districts in the 1991 Apportionment Plan compared to only four (4) in the 1981 apportionment and six (6) in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Defendants' Ex. 17 and 20; Defendants' Ex. 96, TR. 114).

Defendants' Exhibit 20 provides:

COMPARISON OF HOUSE DISTRICTS
WITH BLACK VAP OVER 50% IN 1991
MAJORITY AND MINORITY APPORTIONMENT PLANS

House District	1991 Majority Plan	House District	1991 Minority Plan
12	65.13	12	67.08
10	63.42	16	66.67
8	61.41	14	63.71
9	58.36	13	60.18
30	56.83	28	57.91
31	52.60	21	50.60
38	50.70		
21	50.30		
TOTAL	8		6

73. Further, there is no relative reduction in the number of districts with over 10% black voting age population. In the 1991 Apportionment Plan, there are twenty (20) districts with over 10% black voting age population, precisely the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter. (Defendants' Ex. 18; Defendants' Ex. 96, TR. 113).

Defendants' Exhibit 18 provides:

COMPARISON OF HOUSE DISTRICTS
WITH BLACK VAP OVER 10% IN 1991
MAJORITY AND MINORITY APPORTIONMENT PLANS

House District	1991 Majority Plan	House District	1991 Minority Plan
12	65.13	12	67.08
10	63.42	16	66.67
8	61.41	14	63.71
9	58.36	13	60.18
30	56.83	28	57.91
31	52.60	21	50.60
38	50.70	33	47.10
21	50.30	19	46.40
49	47.65	36	45.26
22	44.31	45	44.98
11	40.61	42	43.09
44	39.52	37	36.20
64	31.19	55	31.19
39	29.23	15	26.46
32	21.58	34	19.55
61	13.81	32	16.71
54	12.93	50	12.49
73	10.76	61	10.92
66	10.32	20	10.88
1	10.07	1	10.07
TOTAL	20		20

74. Both BEDO and NAACP recognize that increasing the black population in certain districts will result in a marginal reduction in black population in other districts. It is not possible to increase the minority population of some districts without reducing it in others. Dana Mattison, for example, testified:

Q. Why didn't BEDO maintain minority districts as they were in 1980 with a spread of black population of 12.20% up to 53% as opposed to creating two districts at 47 and 57 percent [in Hamilton County] and taking black population from the remaining districts?

A. Well, primarily because of our understanding of totality of circumstances much of which was new to the political arena vis-a-vis the 1982 amendments to the Voting Rights Act that wasn't present in 1980, and based on our assessment these were the numbers that were required to comport with our understanding of the requirements.

Q. But the effect of doing that, Mr. Mattison, is to reduce the black population in the remaining districts in Hamilton County?

A. That's what happens when you've got too few African-Americans in a district based again on totality of circumstances and they got to come from somewhere.

(Deposition of Mattison, Defendants' Ex. 98, TR. 56)

75. The 1991 Apportionment Plan doubles the number of majority-minority districts in Ohio while maintaining the same relative composition of black population in the current districts represented by minority incumbents.

76. Defendants' Exhibit 21 reflects the percentage change in black population in districts currently served by minority incumbents. Three districts in Cuyahoga County with a black population of 74.8%, 90.1% and 94.6% under the 1981 Apportionment Plan were reduced to 65.6%, 67.0% and 67.0% black population. This was done to avoid diluting minority voting strength. The packing of minority population into super majority-minority districts as found in the 1981 Apportionment Plan dilutes minority voting power. Seven (7) districts,

however, were increased in black population. (Defendants' Ex. 21). Defendants' Exhibit 21 provides:

PERCENTAGE POPULATION OF HOUSE DISTRICTS WITH MINORITY REPRESENTATIVES

Current State Representative	1981 House District Number	1981 Percent Black Population	1991 House District Number	1991 Percent Black	Percentage Change
Troy James	12	74.8%	10	67.0%	− 7.8
C.J. Prentiss	14	90.1%	8	65.6%	−24.5
Vermel Whalen	16	94.6%	12	67.0%	−27.6
William Mallory	23	45.9%	31	59.7%	+13.8
Helen Rankin	25	53.2%	30	60.9%	+ 7.7
Ray Miller	29	38.5%	21	55.7%	+17.2
Otto Beatty	31	46.8%	22	48.0%	+ 1.2
Rhine McLin	36	42.1%	38	54.6%	+12.5
Tom Roberts	37	36.1%	39	32.2%	− 3.9
Vernon Sykes	42	35.4%	44	43.0%	+ 7.6
Casey Jones	45	41.7%	49	50.0%	+ 8.3

77. All elevent (11) districts currently served by minority incumbents remain strongly Democratic districts in the 1991 Apportionment Plan. (Defendants' Ex. 59).

Defendants' Exhibit 59 provides:

POLITICAL STRENGTH OF MINORITY INCUMBENTS—1991 APPORTIONMENT PLAN

1981 House District	Incumbent	Political Index	1991 House District	Political Index	Result
12	Troy James	80.15	10	79.04	Strongly Democratic
14	C.J. Prentiss	84.83	8	75.23	Strongly Democratic
16	Vermel Whalen	87.18	12	78.88	Strongly Democratic
23	William Mallory	65.74	31	69.28	Strongly Democratic
25	Helen Rankin	66.74	30	74.68	Strongly Democratic
29	Ray Miller	62.97	21	76.50	Strongly Democratic
31	Otto Beatty	66.33	22	69.35	Strongly Democratic
36	Rhine McLin	64.40	38	75.63	Strongly Democratic
37	Tom Roberts	62.52	39	64.40	Strongly Democratic
42	Vernon Sykes	58.64	44	72.21	Strongly Democratic
45	Casey Jones	64.99	49	77.64	Strongly Democratic

78. Robert Dykes prepared the apportionment plan submitted by Messrs. Ferguson and Quilter (the "1991 Minority Plan"). Dykes also prepared the 1981 Apportionment Plan for Messrs. Ferguson and Quilter, which plan a federal court held was drafted with the intent to dilute minority voting strength. *Armour v. Ohio*, No. 88-1104Y (N.D.Ohio Sept. 4, 1991). The *Armour* Court also found Dykes' 1981 plan had effectively diluted minority voting strength.

79. Dykes conducted no analysis of the requirements of the Voting Rights Act, no analysis of racial bloc voting and no analysis of the "totality of the circumstances" in establishing minority districts in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Deposition of Dykes, November 21, 1991, Defendants' Ex. 80, TR. 65, 72, 74, 75, 128, 204).[5]

80. Instead, Dykes relied totally on the recommendations of BEDO and Dr. Larry Brisker, the Minority's (Ferguson and Quilter's) consultant. Accordingly, the BEDO apportionment plan and the plan submitted by Messrs. Ferguson and Quilter are identical. Plaintiffs themselves increased the percentage of black population in all districts served by minority incumbents as recommended by BEDO. (Deposition of Dykes, Defendants' Ex. 80, TR. 62, 63, 67, 108, 113, 125, 129, 158, 160, 167, 170).

81. Gordon Henderson (Plaintiffs' expert in *Quilter v. Voinovich*) likewise performed no analysis of the requirements of the Voting Rights Act or the "totality of circumstances" factors. (Deposition of Gordon Henderson, December 12, 1991, Defendants' Ex. 99, TR. 93).[6]

82. Although Mr. Henderson performed no Voting Rights Act analysis in this case, his first principle in apportionment is to avoid diluting minority voting strength. (Defendants' Ex. 99, TR. 8).

83. Mr. Henderson's position is that an apportioning body must create majority-minority districts whenever possible and must always maintain or enhance minority voting strength. (Defendants' Ex. 99, TR. 83, 91). Mr. Henderson testified:

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[5] The deposition of Robert Dykes taken on November 21, 1981 is submitted as Defendants' Ex. 80.

[6] The deposition of Gordon Henderson taken on December 12 is submitted as Defendants' Ex. 99.

Q. That is a good point, anybody engaged in apportionment must avoid minority voter dilution. Is that what I just heard you say?

A. Yes.

Q. And they must do that affirmatively, isn't that true?

A. Well, I don't see how you do it, if not affirmatively.

Q. Good. And deliberately, isn't that true?

A. All right.

Q. You agree with that?

A. I can buy that.

(Defendants' Ex. 99, TR. 114).

84. Mr. Henderson agreed that there should be changes in the existing 1981 districts to avoid minority vote dilution. He testified:

Q. Is it your position that there should be no change in the existing districts in order to avoid minority vote dilution?

A. Oh no, no, not at all.

(Defendants' Ex. 99, TR. 202)

85. Further, Mr. Henderson did not criticize the 1991 Apportionment Plan merely because of the number of districts with black population of 10% or more. He testified:

Q. You're not criticizing the majority plan simply because of the number of districts with black population of 10% or more?

A. As such?

Q. Right?

Q. Oh no, not at all. Not at all.

(Defendants' Ex. 99, TR. 170)

C. Totality of Circumstances

1. *Geographical Cohesion of Minority Communities*

86. Significant minority populations in all major urban counties are geographically compact and contiguous. (Defendants' Exs. 26, 30, 34, 38, 42, 46, and 50; Defendants' Ex. 96, TR. 53-76).

87. The districts created in the 1991 Apportionment Plan are geographically compact and contiguous. Defendants' Exhibits 27-29 (Cuyahoga), 31-33 (Franklin), 35-37 (Hamilton), 39-41 (Montgomery), 43-45 (Summit), 47-49 (Lucas) and 51-53 (Mahoning); Defendants' Ex. 96, TR. 66-77).

2. *Political Cohesion*

88. All minority districts in the 1991 Apportionment Plan are politically cohesive. Blacks tend to vote for democratic candidates by a substantial majority. (Defendants' Ex. 96, TR. 64).

3. *Racial Bloc Voting*

89. Gordon Henderson (Plaintiffs' Expert in *Quilter v. Voinovich*) purported to have conducted a regression analysis of racial bloc voting but only for the eleven (11) house districts currently served by minority incumbents. Mr. Henderson reviewed only eleven (11) House races in 1990. Mr. Henderson presented no support of his regression analysis and provided no standard deviations for his analysis. (Defendants' Ex. 99, TR. 17).

90. Mr. Henderson reviewed only one (1) district (Shaker Heights) out of ninety-nine (99) in the Jesse Jackson campaign. He found no racial bloc voting in the 1988 Jesse Jackson campaign based on his review of only one (1) district. (Defendants' Ex. 99, TR. 13).

91. Mr. Henderson reviewed no primary election data. (Defendants' Ex. 99, TR. 78).

92. A review of Henderson Exhibit 3 indicates that there is evidence of racial bloc voting in the eleven (11) districts served by minority incumbents. Based on 1990 election results, for example, in H.D. 29, 55% of white voters did not vote for the black Democratic candidate in a heavily Democratic district. In. H.D. 36, 97% of blacks voted for the black candidate, 65% of white voters did not. In H.D. 37, 95% of black voters voted for the black candidate, 54% of the white voters did not. In H.D. 42, 95% of black voters voted for the black candidate, 52% of white voters did not. (Henderson Exhibit 3).

93. In preparing the 1991 Apportionment Plan, Mr. Tilling considered election returns for house and senate and statewide races from 1982 through 1990. He also considered the Jesse Jackson primary campaign for President. Mr. Tilling did a precinct-by-precinct review and found significant evidence of racial bloc voting statewide. (Defendants' Ex. 96, TR. 91).

94. Defendants' Exhibit 70 is a compilation of Statewide Election Results—Precinct by Precinct for 1982, 1984, 1986, 1988 and 1990.

95. Defendants' Exhibit 71 is a compilation of Ohio House and Senate Election Results—Precinct by Precinct for 1982, 1984, 1986 and 1988.

96. Defendants' Exhibit 72 is a compilation of Miscellaneous Local Election Races for a variety of years.

97. Defendants' expert, Dr. Gary King, is Professor of Government at Harvard University and is Director of the Harvard Data Center. Dr. King is a political scientist and statistician, specializing in quantitative methods and application of quantitative methods to redistricting. Dr. King received his Ph.D from the University of Wisconsin in 1984. Dr. King has published extensively in the area of apportionment in such scholarly journals as the *American Journal of Political Science*, the *Journal of the American Statistical Association* and *American Politics Quar-*

terly. Dr. King has received numerous grants and awards including those from the National Science Foundation, the Smith Richardson Foundation and the Citizen Participation in Government Foundation. Dr. King is an editorial board member of the *Journal of Politics*, the *Public Opinion Quarterly*, *The American Journal of Political Science* and other journals. Dr. King has lectured extensively in the area of political science and apportionment. (Deposition of Dr. Gary King, December 13, 1991. Defendants' Ex. 95, TR. 5, 6; Defendants' Ex. 85).[7]

98. Gordon Henderson (Plaintiffs' expert in *Quilter v. Voinovich*) has never written or published anywhere on apportionment, redistricting, gerrymandering, racial bloc voting, or minority voting rights.

99. Dr. King analyzed over 200 elections from 1982 through 1990. Dr. King conducted a bivariate ecological regression analysis and determined that *all* the data indicated significant racially polarized voting. (Defendants' Ex. 95, TR. 40).

100. Defendants' Exhibits 92 and 93 indicate the results of Dr. King's analysis of elections to determine the existence of racially polarized voting. The elections analyzed included presidential races, congressional races, house and senate races, statewide office races and local elections. Election results were analyzed by precinct. Every result indicated a significant degree of racially polarized voting. (Defendants' Ex. 95, TR. 40; Defendants' Exs. 91 and 93). Dr. King also testified regarding the absence of partisan bias before the entire Apportionment Board on February 11, 1992.

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[7] Dr. King's deposition taken on December 13, 1991 is submitted as Defendants' Ex. 95. Dr. King testified at the February 11, 1992 Apportionment Board hearing where he reaffirmed his deposition testimony and the testimony before the Federal District Court on December 17, 1991 and offered further supporting testimony on racial bloc voting and partisan bias.

101. Dr. King verified the results of his bivariate ecological regression analysis by conducting a homogeneous precinct analysis and an analysis based on an aggregated compound multinomial model. These analyses confirmed the results of the bivariate ecological regression analysis. (Defendants' Ex. 95, TR. 44).

102. Dr. King testified that Mr. Henderson's review of Jesse Jackson election data from only one (1) out of ninety-nine (99) districts was not a statistically reasonable basis upon which to draw conclusions on racial bloc voting in Ohio. (Defendants' Ex. 95, TR. 47).

103. Dr. King also testified that Henderson Exhibit 3 was not a regression analysis, was not supported and provided no indication by standard errors of the degree of certainty of the analysis. Even if acceptable, Henderson Exhibit 3 reflects significant racial bloc voting. (Defendants' Ex. 95, TR. 49, 50).

104. Dr. King testified that simply because black Democrats vote for a Democrat does not indicate that the candidate is the candidate of choice for minorities since there is no analysis of any primary in Henderson's analysis and no analysis of whether the eventual candidate is the candidate of choice. (Defendants' Ex. 95, TR. 51).

4. *Totality of Circumstances*

105. Robert Dykes and Gordon Henderson, Plaintiffs' experts in *Quilter v. Voinovich*, have offered no evidence whatsoever regarding "totality of circumstances" factors established in *Thornburg v. Gingles* as factors to be considered in a Section 2 claim. (Deposition of Dykes, Defendants' Ex. 80, TR. 65, 72, 74, 75, 128 and 204; Deposition of Henderson, Defendants' Ex. 99, TR. 93).

106. In drafting the 1991 Apportionment Plan, Mr. Tilling reviewed totality of circumstances factors to determine the reasonableness of the minority districts created. (Defendants' Ex. 96, TR. 96-113).

a. *History of Official Discrimination*

107. There exists evidence of a history of official discrimination in the State of Ohio and local political subdivisions that touched the rights of minorities to participate in the democratic process.

108. The 1981 apportionment plan was held to unlawfully dilute minority voting strength in *Armour v. State of Ohio*, Case No. C88-1104Y (Slip Op. dated 9/4/91).

109. The 1981 apportionment plan diluted minority voting strength in that the plan revealed in only four (4) majority-minority districts in Ohio, three (3) of which were in Cuyahoga County. (Defendants' Ex. 17).

110. Until 1991, when the Republicans constituted a majority of persons responsible for apportionment, minorities did not effectively participate in the state apportionment process. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 95).

111. Dana Mattison, Executive Director of BEDO, testified that the 1981 apportionment plan "fragmented" minority voting strength. He testified:

> Q. Would you say that the 1981 apportionment on occasion in some districts packed minority voting strength?
>
> A. No, I didn't find the issue of packing to be an issue much more of slicing.
>
> Q. Fragmenting?
>
> A. Yeah.

(Defendants' Ex. 82, TR. 33)

112. Mr. Mattison found that in the 1981 apportionment, the effects of discrimination led to unreasonably high percentages of blacks in urban districts in Cleveland due to urban flight, discrimination and immobility of the black population. (Deposition of Mattison, Defendants' Ex. 82, TR. 37).

113. Mr. Mattison also found evidence of "fragmenting" black population in Youngstown, Mansfield, Akron, Toledo, Franklin County and generally throughout the major urban counties in Ohio. (Defendants' Ex. 82, TR. 37-40). He testified:

> Q. Okay. But you looked at those issues in Franklin, Hamilton, Montgomery, Summit, Lucas, Stark, Mahoning and Cuyahoga Counties?
>
> A. We looked at them in all of them, all the counties.
>
> Q. All right, very good. And you reconfigured districts in all those counties because of either packing or fragmenting or other concerns?
>
> A. Or other concerns, yes.
>
> (Defendants' Ex. 82, TR. 40).

114. There are numerous reported cases in Ohio and in the Sixth Circuit finding minority discrimination in police and fire departments, in education, in housing, in elections, in state contracting, in employment and in zoning practices. (Defendants' Ex. 66). These cases include:

MINORITY DISCRIMINATION CASES

1. *Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986) (Court approved consent decree entered to remedy discrimination against blacks and Hispanics in promotion and advancement practices within City of Cleveland Fire Department).

2. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979) (Dayton Board of Education intentionally operated racially segregated school system).

3. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979) (Columbus Board of Education intentionally operated racially segregated school system).

4. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) (City of Akron discriminated against minorities by amending city charter to require voter approval of any ordinance dealing with discrimination in housing).

5. *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991) (Ohio Governor, Ohio Secretary of State, and Members of Hamilton County Board of Elections conceded that at-large election of Hamilton County Municipal Court Judges unlawfully diluted minority voting strength under § 2 of the Voting Rights Act).

6. *Youngblood v. Dalzell*, 804 F.2d 360 (6th Cir. 1986) (Court affirmed order enforcing consent decree which was designed to remedy "past practices [which] might give rise to 'an inference of a pattern or practice of discrimination'" on the basis of race within the Cincinnati Fire Department), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1576, 94 L.Ed.2d 767 (1987).

7. *Ohio Contractors Ass'n v. Keip*, 713 F.2d 167 (6th Cir. 1983) (State of Ohio properly enacted statute setting aside a percentage of state contracts for award to minority business enterprises as remedy for past discrimination in the award of state contracts).

8. *United States v. City of Panama*, 661 F.2d 562 (6th Cir. 1981) (City of Parma, by rejecting all public and low-income housing, was maintained as a racially segregated community), *cert. denied*, 456 U.S. 926, 102 S.Ct. 1972, 72 L.Ed.2d 441 (1982).

9. *Brown v. Neeb*, 644 F.2d 551 (6th Cir. 1981) (Court found that City of Toledo had not made progress in complying with consent decree entered into to redress past discrimination in em-

ployment of blacks and Hispanics in the fire department, and therefore modified consent decree to proscribe layoffs on basis of seniority).

10. *Reed v. Rhodes*, 607 F.2d 714 (6th Cir. 1979) (Cleveland Board of Education intentionally operated a school system which was unconstitutionally segregated on the basis of race), *cert. denied*, 445 U.S. 935, 100 S.Ct. 1329, 63 L.Ed.2d 770 (1980), *appeal after remand*, 662 F.2d 1219 (6th Cir. 1981) (Ohio State Board of Education and Ohio Superintendent of Public Instruction intentionally supported the unconstitutional segregation of the Cleveland City School District), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1713, 72 L.Ed.2d 135 (1982).

11. *Sarabia v. Toledo Police Patrolman's Ass'n*, 601 F.2d 914 (6th Cir. 1979) (approving consent decree entered into to remedy racial imbalance in City of Toledo's police department).

12. *Afro American Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (City of Toledo police department racially discriminated in its hiring and promotion practices).

13. *Clemons v. Board of Educ. of Hillsboro*, 228 F.2d 853 (6th Cir.) (Hillsboro Board of Education intentionally maintained racially segregated elementary school system by establishing a racially gerrymandered zoning system), *cert. denied*, 350 U.S. 1006, 76 S. Ct. 651, 100 L.Ed. 868 (1956).

14. *Police Officers for Equal Rights v. City of Columbus*, 644 F. Supp. 393 (S.D. Ohio 1985) (City of Columbus racially discriminated in promotions, transfers, and assignments for members of its police department).

15. *Smith v. Columbus Metro. Hous. Auth.*, 443 F.Supp. 61 (S.D. Ohio 1977) (Columbus Metropolitan Housing Authority unlawfully demoted a black employee when she refused to assist it in its defense of a charge of unlawful racial discrimination).

16. *Dozier v. Chupka*, 395 F.Supp. 836 (S.D. Ohio 1975) (City of Columbus used racially discriminatory employment practices in hiring members of fire department).

17. *Shield Club v. City of Cleveland*, 370 F. Supp. 251 (N.D. Ohio 1972) (City of Cleveland used racially discriminatory tests for hiring and promotion within police department).

18. *Banks v. Perk*, 341 F. Supp. 1175 (N.D. Ohio 1972) (City of Cleveland discriminated on basis of race by revoking and refusing to issue building permits for public housing in white areas of city; Cuyahoga Metropolitan Housing Authority discriminated on the basis of race by failing to integrate public housing), *aff'd in part, rev'd in part*, 473 F.2d 910 (6th Cir. 1973).

19. *Etheridge v. Rhodes*, 268 F. Supp. 83 (S.D. Ohio 1967) (State of Ohio was a joint participant with private contractors in denying Afro-Americans employment on public works projects).

20. *Vann v. Toledo Metro. Hous. Auth.*, 113 F. Supp. 210 (N.D. Ohio 1953) (in action alleging racial discrimination in public housing, the court allowed four months for the Toledo Metropolitan Housing Authority to implement its new non-segregation policy).

21. *Headen v. City of Cleveland*, No. C73-330 (N.D. Ohio April 25, 1975) (City of Cleveland un-

lawfully discriminated against minorities in hiring practices for fire department).

22. *Allison v. City of Akron*, 45 Ohio App. 2d 227, 343 N.E. 2d 128 (Summit App. 1974) (City of Akron discriminated on basis of race by passing ordinance prohibiting the display of real estate "for sale" signs only in certain sections of the city).

23. *Culver v. City of Warren*, 84 Ohio App. 373, 83 N.E. 2d 82 (Trumbull App. 1948) (City of Warren racially discriminated in the use of its municipal swimming pool).

24. *Alexander v. Bd. of Election*, 675 F.2d 787 (6th Cir., 1982) (School system desegregation).

25. *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983) (Fire department discrimination).

115. In *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991), the Governor, Secretary of State, and Members of the Hamilton County Board of Elections conceded that the at-large election of Hamilton County Municipal Court Judges unlawfully diluted minority voting strength under Section 2 of the Voting Rights Act.

116. Mr. Mattison testified that BEDO conducted an analysis of totality of circumstances factors. Regrading the history of official discrimination, Mr. Mattison testified:

> We came to the conclusion that there should be a construction of districts in order to minimize what has been a history of exclusion throughout the United States of African-American votes in the electoral process.
>
> (Defendants' Ex. 82, TR. 21)

117. Mr. Mattison concluded that there was, in Ohio, a history of unresponsiveness of government to the interests of the black community.

> A. Well, I guess I am talking not so much about partisan politics as I am government as a nonpartisan administrative entity.
>
> Q. And you see that as unresponsiveness to the interests of the black community?
>
> A. Absolutely.
>
> Q. And that is not something that just occurred today, that's been ongoing.
>
> A. It's an ongoing issue.
>
> Q. And that history you are talking about is a history not just in Cuyahoga County, but Franklin, Hamilton, Montgomery, Summit, all the major areas of Ohio?
>
> A. Absolutely.

(Defendants' Ex. 82, TR. 31-32)

118. Mr. Mattison testified that the effects of discrimination have resulted in black voter apathy in Cuyahoga County. He testified:

> Q. And then in Cuyahoga County, in the Cleveland area in the BEDO plan, your final percentages of black voting population in the majority minority districts were, ranged from 60 percent to 67 percent, or thereabouts?
>
> A. I don't really recall the specific number.
>
> Q. Okay. And why didn't you go to black voting or black population in those districts of 50 percent or 51 percent, or in the lower—
>
> A. Well, as I said, voter participation and voter behavior in Cleveland frankly has been pretty bad as it relates to African American voters. So while I think there are a number of factors, economic status has to do with that, inability of individuals to see a reason for voting in a situation where they

don't feel that their interests are being represented, all of those kinds of things I think add to voter apathy and exacerbate the situation in the African American community.

So our view again was a total view. We came up with the percentages we did based on voter behavior.

Q. Okay. But you went to a higher percentage than just 50.1 percent.

A. Well, we started at 50.1 and then we moved.

Q. You moved up because of the circumstances you described.

A. (Witness nods head.)

Q. And that is reasonable in your position.

A. Absolutely.

Q. Okay. And that is because of the factors of low voter turnout and other things you just described.

A. Absolutely.

Q. And the court needs to understand that when they look at the districts in Cuyahoga County; do they not?

A. Absolutely.

(Defendants' Ex. 82, TR. 52, 53)

119. Mr. Mattison also testified that there is governmental discrimination based on governmental apathy in Ohio to the interests of the black community. (Defendants' Ex. 82, TR. 31).

120. School systems operate under desegregation orders in major urban areas in Ohio. (Defendants' Ex. 66). As indicated by Mr. Tilling's participation on the Joint Select Committee on School Desegregation in the General Assembly (unanimously supported by Republicans), the effects of school desegregation in education in Ohio persist. (Defendants' Ex. 96, TR. 96, 97). (See also Deposition of Dana Mattison, Defendants' Ex. 82, TR. 57; Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 34).

121. Floyd Johnson testified concerning discrimination orders in Montgomery County, Ohio. He testified:

> Q. Now to the extent again you have personal knowledge in the Montgomery County area, is the school system still subject to a desegregation order?
>
> A. Court ordered.
>
> Q. Do you know of any other discrimination orders existing in Montgomery County in the public sector, for example the fire department, police department, or anything like that?
>
> A. They just settled yesterday a police discrimination suit in hiring for the Dayton police and fire departments that Representative McLin was intimately involved in and efforts have been made to recruit minorities for the police force. And that's the FOP, which is the police, quote-unquote white police union, and the judge made a ruling yesterday that the City of Dayton did not overtly discourage minorities from applying.
>
> However, over the course of twelve years the City of Dayton had made substantial appeals to hiring minority through the fire and police departments, so the judge made the ruling as a result of the NAACP's effort and Southern Christian Leadership and the various ministers associations' efforts to get blacks employed in the police department, so although it wasn't a court order, that has been in the courts.
>
> Q. And you say that has been settled?
>
> A. Yesterday there was a ruling by Judge Rice.
>
> Q. And what is the effect of that settlement then?
>
> * * * *
>
> A. There was in effect in the City of Dayton an ordinance to set aside certain contracts for minority contractors because of past discrimination against minorities who wanted to do business in the trades, and it was set aside, suspended, January 30th of 1989.

A study was conducted by and paid for by the Dayton City Commission that documented racial discrimination in award of contracts, and recommendations have been made to the City Commission to attempt to reinstate that program within the framework of the Supreme Court ruling. It's not a court order but it is, the program is on suspension because of a Supreme Court ruling. And the discrimination is still there.

(Defendants' Ex. 97, TR. 34-36)

122. Virtually all public witnesses in the public hearings urged the persons responsible for apportionment to maintain and enhance majority-minority and influence districts throughout the state. These witnesses included:

1. Peter Silverman, Toledo City Council (October 8, 1991, TR. 74).
2. Fred Parker, Columbus Branch, NAACP (August 29, 1991, TR. 25, 26);
3. William Nelson, Professor of Black Studies, Ohio State University (August 29, 1991, TR. 25-26).
4. Thaddeus Jackson, Chairman Cuyahoga County Board of Elections, Vice-Chairman, 21st Congressional District Caucus (August 28, 1991, TR. 21).
5. James Mitchell, Black Elected Suburban Officials (August 28, 1991, TR. 24);
6. Dr. Gordon Wetz—Wright State University August 29, 1991, TR. 20)
7. Reverend Richard L. Righter, Pastor, Congregation of Reconciliation (August 29, 1991, TR. 31);
8. Ray Segritz—Councilman—City of West Carrollton (August 29, 1991, TR. 44);

9. Frank Allison, Cincinnati Branch, NAACP (September 7, 1991, TR. 36);

10. Jerry Hammond, former President of Columbus City Council (September 7, 1991, TR. 48-49);

11. Samuel Graham, Columbus Urban League (September 7, 1991, TR. 61);

12. Mark Bradley, People's Coalition For Voter Participation (September 7, 1991, TR. 61);

13. Wayne West, Young Black Democrats (September 7, 1991, TR. 67);

14. Cathy Mock, President, Young Black Democrats (September 7, 1991, TR. 109);

15. Robert Deitchman, President of Equal Access Education Association (September 12, 1991, TR. 16).

123. Both the NAACP and the BEDO have taken the position that the persons responsible for apportionment must create majority-minority districts wherever possible and must maintain and enhance existing minority districts. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 47; Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 42-50).

a. *Racial Bloc Voting*

124. There exists clear evidence of racial bloc voting throughout the State of Ohio. Dr. King analyzed over 200 elections from 1982 through 1990. Dr. King conducted a bivariate ecological regression analyses and determined that all the data indicated significant racially polarized voting. (Defendants' Ex. 95, TR. 40). Defendants' Exhibits 92 and 93 indicate the results of Dr. King's analysis. Dr. King verified the results of his bivariate ecological regression analysis by conducting a homogeneous present analysis and an analysis based on an aggregated compound multinomial model. These

analyses confirmed the results of the bivariate ecological regression analysis. (Defendants' Ex. 95, TR. 44). See also Transcript of Board Hearing, February 11, 1992, TR. 46-55.

125. Gordon Henderson presented no support of his regression analysis and no standard deviations to verify the degree of certainty of his analysis which only reviewed eleven house districts currently served by minority incumbents. Mr. Henderson also only reviewed those races for one year. On that basis, Mr. Henderson's analysis is not credible.

c. *Racial Barriers To Effective Participation*

126. Minorities have experienced racial barriers to effective participation in the democratic process in Ohio.

127. As Executive Director of BEDO and as an active participant in Ohio Democratic politics, Dana Mattison is knowledgeable concerning Ohio Democratic primaries and screening processes. Mr. Mattison testified that there is no consistent system of open primaries in the Democratic party. Local "screenings" of candidates occur both on a county level. "Unofficial processes" occur where various organizations may provide endorsements. (Defendants' Ex. 82. TR. 26, 27).

128. Minorities receive no significant financial support from the Ohio Democratic Party. Mr. Mattison testified:

> Q. And is there financing available from the State Democratic Party?
>
> A. I have not known that to be a big force of financial support. The answer to that in the main is no.
>
> (Defendants' Ex. 82, TR. 28)

129. Mr. Mattison testified that there have been barriers to recruitment of black candidates for state legislative offices. He testified:

Q. Again because we're talking about state legislative apportionment now for the moment, with regard to state representative offices and state senator offices, have there been some barriers in order to recruit black candidates for those offices?

A. Absolutely.

(Defendants' Ex. 82, TR. 28)

130. These barriers include racial bloc voting, campaign financing, "electibility" of blacks and governmental apathy. (Defendants' Ex. 82, TR. 28, 29).

131. "Electibility" of blacks prevents a barrier to effective participation of blacks in primaries. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 29). Mr. Mattison testified:

Q. You also talked about electibility as being a problem, as a barrier, racial barrier. What do you mean by that?

A. Electibility, based on a very clear—and again this probably more gut than statistical, although I think the statistics would bear it out—that African Americans, people will vote for African-Americans simply based on the fact that they are African Americans, and that our perception has been that translates into, "I don't care how good you are, I don't care how much you know about your subject matter, and how astute you are". It goes to the issue of racial bloc voting, is really what I am talking about.

(Defendants' Ex. 82, TR. 32, 33)

132. Race plays a role in Ohio elections. Mr. Mattison testified:

Q. Have there been elections that you are aware of in the major urban areas of Ohio where African Americans were not elected simply because of their race?

A. Yes.

Q. Okay. Could you give us some examples or elaborate on that?

A. Sure, I think the best example is the Mallory case out of Cincinnati. From a statistical standpoint it's very clear what has happened down there. Irrespective of party, individuals will vote for white candidates, irrespective of who is most qualified, irrespective of whether the person runs as a Democrat, as a Republican. There clearly is racial bloc voting in that area.

(Defendants' Ex. 82, TR. 33, 34)

133. Mr. Mattison further testified:

Q. Have you seen barriers to black candidates, successful black candidates in Cincinnati, because of the at-large system in Cincinnati?

A. Absolutely, judicial as well. That is the crux of the Mallory case.

Q. Where is the Mallory case now, where is that?

A. The decision has been rendered, and again this is a result of a recent Supreme Court decision, that said judicial races are in fact subject to the Voting Rights Act. But the decision has been rendered. The question now is the remedy that is being discussed and negotiated.

(Defendants' Ex. 82; TR. 63)

134. Blacks have not been fully supported by the Ohio Democratic Party. Mr. Mattison testified:

Q. Are you totally satisfied, Mr. Mattison, that black candidates have been fully supported by Democratic, by the Democratic Party in Ohio?

A. I think to the extent—well, let me just say no, I don't think that they have been supported as much as they should have been. But I think it's indicative of more than just a partisan issue. I

don't think any black pursuing political office has been supported in this system as they should have been.

(Defendants' Ex. 82, TR. 64)

135. Campaign financing and party endorsement pose effective racial barriers to black participation in the Democratic primary system. (Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 23, 24). Mr. Johnson testified:

Q. Have you in your experience recognized that it is difficult for black candidates to raise campaign financing?

A. Absolutely.

Q. And why is it difficult?

* * * *

A. In the early days we didn't have access to and relationships with groups and individuals who had an interest in supporting minority candidates.

And after the incumbency they did, so an incumbent could raise money if he was doing, he or she was doing their job, as well as a white candidate could—not at the same level, but they could. But a new candidate just coming out would have very difficult opportunities for raising capital.

Q. Would that still be the situation day?

A. Absolutely.

(Defendants' Ex. 97, TR. 28).

136. Mr. Johnson testified that the Democratic Party screening process creates racial barriers to black candidates in Ohio. He testified:

Q. Okay. In the Democratic party, to the extent you have personal knowledge, how does one become a candidate as a Democrat in the primary?

A. Well, in Montgomery County you submit your name to a screening committee, which is appointed

by the chairman, and then the screening committee would make a recommendation to the executive committee and the executive committee makes a recommendation to the central committee. And the central committee votes. Some were cut and dry, but that is a quote-unquote Democratic process.

Q. You say it may be cut and dry on occasion. What did you mean?

A. It may be cut and dried since the individuals on the executive committee normally are employees of some elected officials and those persons on the central committee are usually the employees of some office.

Q. Does that structure create any barriers for black candidates?

A. If a candidate is an independent thinker it creates substantial barrier.

(Defendants' Ex. 97, TR. 33, 34).

See also Transcript of Board Hearing, February 11, 1992, TR. 66.

137. In 1981, the Democrats effectively precluded minority Senator Morris Jackson's participation in drawing district lines. (Defendants' Ex. 96, TR. 98). In the early 1980's, Democrats foreclosed Senator Jackson's participation as a delegate to the Democratic National Convention. (Defendants Ex. 96, TR. 98).

e. *Effects of Discrimination*

138. Minorities in Ohio bear the effects of discrimination in education, employment, and health which hinder their ability to participate effectively in the political process. See Defendants' Ex. 106, *Ohio's African-American Males: A Call To Action*, Report of Governors' Commission on Socially Disadvantaged Black Males and Defendants' Ex. 107, *Final Report, Governors Task Force*

of Black and Minority Health; Testimony of Johnson, Transcript of Board meeting of February 11, 1992, TR. 67.

139. Blacks experience a significantly higher unemployment rate in Ohio and significantly less opportunity for professional employment. This occurs throughout the state and every major urban area in Ohio. Specifically, in 1990, the unemployment rate for white males was 4.6% but 16.6% for black males. Total unemployment for whites was 4.6% but 14.2% for blacks. Unemployment for whites, ages 16 to 19, was 11.6% but 40.4% for blacks, ages 16 to 19. The unemployment rate for blacks was 13.6% in Cincinnati, 17.3% in Cleveland, 6.8% in Columbus and 10.6% in Dayton—all significantly higher than whites. Similar statistics apply in 1988 and 1989. (Defendants' Exs. 64, 65 and 66; Defendants' Ex. 96, TR. 97). (See also Deposition of Floyd Johnson, Defendants' Ex. 97, Tr. 36).

140. Defendants' Exhibit 101 is a summary of unemployment rates by race for 1979 through 1990 in the major urban areas of Ohio based on published statistics of the Bureau of Labor Statistics. The summary reflects a disparity in employment by race.

SUMMARY OF UNEMPLOYMENT RATES BY RACE
(annual averages)*

	Cincinnati SMSA		Cleveland SMSA		Columbus SMSA		Dayton/Springfield SMSA	
	White	Black	White	Black	White	Black	White	Black
1979	5.6%	12.7%	4.4%	12.6%	NA	NA	NA	NA
1980	6.9%	20.5%	6.7%	19.0%	NA	NA	NA	NA
1981	9.0%	22.4%	8.0%	20.8%	NA	NA	NA	NA
1982	12.4%	NA	8.5%	23.8%	NA	NA	NA	NA
1983	11.3%	26.0%	9.6%	18.8%	NA	NA	NA	NA
1984	7.8%	24.8%	7.2%	18.8%	NA	NA	NA	NA
1985	7.8%	15.8%	6.7%	21.5%	NA	NA	NA	NA
1986	6.2%	16.6%	5.6%	20.3%	4.9%	11.4%	5.7%	11.6%
1987	4.4%	14.9%	5.8%	14.8%	4.1%	11.0%	4.3%	10.6%
1988	4.5%	13.5%	5.3%	14.2%	4.3%	10.3%	3.7%	10.4%
1989	3.2%	13.6%	3.6%	17.3%	4.4%	6.8%	4.1%	10.6%
1990	3.7%	13.7%	3.4%	15.1%	3.5%	11.7%	4.9%	15.1%

* Taken from *Geographic Profile of Employment and Unemployment, 1979* through *Geographic Profile of Employment and Unemployment, 1990*, published by the United States Department of Labor, Bureau of Labor Statistics.

141. Defendants' Exhibit 102 reflects mean household income based on 1980 census data in the eight major urban counties of Ohio. The exhibit reflects discrepancy in mean household income by race.

MEAN HOUSEHOLD INCOME (1979)
(from 1980 census) *

	White	Black
Cuyahoga County	$23,130	$15,070
Franklin County	21,138	14,416
Hamilton County	22,770	13,825
Lucas County	21,540	14,315
Mahoning County	20,259	14,118
Montgomery County	21,463	14,823
Summit County	21,811	14,481
Stark County	20,846	15,239

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

142. Defendants' Exhibit 103 reflects the percentage of families living below the poverty level based on 1980 census data for the eight major urban counties of Ohio. The exhibit reflects discrepancy in the number of families living below the poverty level by race:

FAMILIES LIVING BELOW POVERTY LEVEL
(from 1980 census) *

	White	Black
Cuyahoga County	4.7%	24.4%
Franklin County	6.3	23.1
Hamilton County	5.0	25.4
Lucas County	6.1	27.2
Mahoning County	5.8	27.3
Montgomery County	6.0	23.8
Summit County	5.2	24.5
Stark County	5.4	24.4

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

143. Defendants' Exhibit 104 reflects education levels for the eight major urban counties in Ohio by race based on 1980 census data. The exhibit reflects a discrepancy in education by race.

EDUCATION
(from 1980 census)*

	% Who Have Not Completed High School (Age 25 and Older)		% Who Have Completed One or More Years of College (Age 25 and Older)	
	White	Black	White	Black
Cuyahoga County	30.5%	44.0%	31.8%	13.8%
Franklin County	25.1	40.2	38.7	24.5
Hamilton County	31.9	50.9	34.9	20.1
Lucas County	31.0	48.0	30.0	21.0
Mahoning County	32.4	48.6	24.8	16.1
Montgomery County	29.2	39.1	32.0	25.5
Summit County	29.3	46.8	30.7	19.5
Stark County	31.5	50.7	23.0	13.9

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

144. Defendants' Exhibit 105 reflects the value of housing, based on 1980 and 1990 census data, by race for the eight major urban counties in Ohio. This exhibit reflects a discrepancy in the value of housing by race.

VALUE OF HOUSING *

	1980 Census (median)		1990 Census (mean)	
	White	Black	White	Black
Cuyahoga County	$54,500	$27,900	$94,051	$51,805
Franklin County	49,000	31,500	93,303	57,580
Hamilton County	50,200	36,900	98,205	60,826
Lucas County	43,400	24,700	72,180	41,073
Mahoning County	39,700	20,200	58,757	29,675
Montgomery County	44,100	25,900	81,259	29,104
Summit County	46,500	24,600	78,424	44,295
Stark County	45,200	23,100	65,582	38,785

* From data compiled by Ohio Department of Development, Ohio Data User's Center.

145. Dana Mattison attributed the discrepancy in income and employment in Ohio to racial discrimination. He testified:

> Q. What do you attribute those factors to, the discrepancy between black and white in terms of income and unemployment in the State of Ohio?
>
> A. In a word, racism.
>
> Q. Racism throughout the major urban areas?
>
> A. Discrimination in employment—I mean there are a whole plethora of reasons, misperception of employers about black employees, inability of employers to provide equal compensation, all of those things, I think—and quite frankly, the status of the economy right now. We have gotten to a point I think in the economy where decisions have to be made about who is going to work and who is not. And unfortunately last hired, first fired.
>
> (Defendants' Ex. 82, TR. 62)

146. Minority voter turnout in Cleveland is extremely low due to minority frustration and apathy. (Desposition of Dana Mattison. Defendants' Ex. 82, TR. 52).

147. The geographical displays of minority population concentrations indicate past discrimination in housing. (Defendants' Exs. 26, 30, 34, 38, 42, 46 and 50).

148. Blacks are less mobile and less able to obtain housing due to past housing discrimination practices. (Desposition of Dana Mattison, Defendants' Ex. 82, TR. 37).

f. *Overt or Subtle Racial Appeals*

149. Political campaigns in Ohio have been characterized by overt or subtle racial appeal.

150. Mr. Mattison testified that he has observed overt or subtle racial appeals in Ohio political campaigns. He testified:

Q. Fair enough. We talked a little bit about political campaigns before. Have you seen racial appeals in political campaigns in Ohio?

A. I would say yes, probably more by ommission than commission.

Q. Have you seen in races in Ohio the deliberate portrayal of pictures of the candidates either on t.v. or media?

* * * *

A. You said by picture?

Q. Yeah, in the media, in the newspapers, you know, where the race is made predominant because of the picture.

A. I am aware of situations where that has happened.

Q. Any other situations like that in state legislative races where race has become an issue because of the campaign itself or in the campaign itself?

A. I think race is automatically made an issue of if one of the candidates is black.

(Defendants' Ex. 82, TR. 64-66)

151. Mr. Johnson, who is also experienced in state politics, has both observed and experienced subtle or overt racial appeals in political campaigns. He testified:

Q. Let me ask you this question. In, regarding the NAACP and your experience with the NAACP and the Ohio Conference of Branches, have you had occasion—strike that.

Let me start the question over again. You had indicated your experience in the voting rights area and civil rights area and the political area. Have you observed in that experience overt or subtle racial appeal in political campaigns?

A. Yes, absolutely.

Q. All right. Would you relate your experiences?

A. My experiences have been that whenever you have candidates of a particular racial or ethnic

group running for office you have got a higher voter turnout, you get a higher voter registration, and in fact one of the exhibits that I didn't share was that, that went into our analysis, was a campaign in Dayton for city commission by candidate Dean Lovelace, in which he won—we had 22 wards. He won ten wards solidly against the endorsed Democrat, and lost the race as a result of strong effort by the party to run its candidate and not take recommendations from the minority community. And that was probably the most polarized race of my 25 year experience. And that information is contained in this report.

(Defendants' Ex. 97, TR. 24, 25)

152. Mr. Johnson testified that race was a factor in his campaign for a house seat in Montgomery County in 1980 against a white Democrat. Mr. Johnson testified:

Q. You had mentioned a campaign that you were involved in, a campaign against a Mr. Ed Orlett.

A. That is correct.

Q. That was in—

A. 1980.

Q. Mr. Orlett was a white candidate?

A. He was a white Democratic candidate who had represented the other influence district in Montgomery County.

Q. And was he a Democrat?

A. He was a Democrat.

Q. Did you run against him as an independent in the primary?

A. As a Democrat in the primary.

Q. Do you believe that there was racial polarized voting in that primary election?

* * * *

A. There was 33 percent black population in that district. I received 33 percent of the vote.

Q. You received 33 percent of the vote?
A. (Witness nods head.)
Q. Mr. Orlett 67 percent?
A. 67, approximately.

(Defendants' Ex. 97, TR. 30, 31)

153. There is a recognition in state Democratic politics that people do not vote for blacks solely because of their race. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 32);

154. There exists racial appeals in political campaigns as evidenced by prominent pictures of black candidates to reinforce the perception that the candidate is black. (Deposition of Dana Mattison. Defendants' Ex. 82. TR. 65; Testimony of Floyd Johnson, Transcript of Board Hearing, February 11, 1992; TR. 66).

155. Opponents in campaigns raise the issue of "welfare" whenever a black candidate runs for office. (Deposition of Dana Mattison. Defendants' Ex. 82, TR. 65).

156. Racial appeals exist in local races in Montgomery County. Higher voter turnout occurs when a black candidate runs for office. (Deposition of Floyd Johnson, Defendants' Ex. 97, TR. 23);

157. Race plays a key role in politics in Central Ohio. Former President of City Council Jerry Hammond cited the Frances-Lashutka race for Columbus' City Attorney and the Moody-Rosemond races for Mayor. (Testimony of Jerry Hammond, September 7, 1991, TR. 48-49);

158. James Tilling, based on his experience in the Senate campaigns, testified that subtle or overt racial appeals have been made in numerous elections, citing the Forbes-Bonono race in Cuyahoga County, the C.J. Thomas-Ike Thompson race, Virgil Browns' race for Secretary of State. Carl Stokes' race for mayor in Cleveland, the Lashutka-Francis race for Columbus City Attorney, the Moody-Francis race for Columbus Mayor and the Lashutka-Espy race for Columbus Mayor. (Deposition of James Tilling, November 20, 1991, TR. 195-198).

g. *Extent to Which Minorities Have Been Elected To Public Office - Population, Demographics and Incumbency Factors*

159. No minority candidate has ever been elected to statewide office in Ohio. (Deposition of Dana Mattison, Defendants' Ex. 82, TR. 41).

160. Defendants' Exhibits 115 is a listing of political races with results where a minority ran against a white for office. This exhibit indicates the following:

SUPREME COURT JUSTICE—GENERAL 1990

Stephanie Tubbs Jones (D)	1,255,556
Craig Wright (R)	1,319,422

SECRETARY OF STATE—PRIMARY 1982

Sherrod Brown (D)	304,952
Anthony O. Calabrese (D)	214,901
Dennis J. Kucinich (D)	246,618
Virgil E. Brown (R)	538,801

GENERAL 1982

Sherrod Brown (D)	1,739,602
Virgil E. Brown (R)	1,362,079
Margaret Ann Leech (LIB)	143,943

SUPREME COURT JUSTICE—PRIMARY 1980

Sara J. Harper (R)	552,776
Frank D. Celebrezze (D)	844,306

GENERAL 1980

Sara J. Harper (R)	1,369,973
Frank D. Celebrezze (D)	2,203,172

PRIMARY 1972

Lloyd O. Brown (D)	606,628
Paul Brown (R)	524,488
George C. Farris (R)	110,816

GENERAL 1972

Lloyd O. Brown (D)	996,674
Paul Brown (R)	1,957,760

161. With the exception of Cuyahoga County, minorities have had little success in elections to local offices. The Affidavit of William Pfeiffer (Pfeiffer Ex. 1) indicates the following:

OHIO BLACK OFFICIALS

	County Commissioners	City Council	Municipal Judges	Common Pleas Judges
Akron (Summit)				
1984	1	2	1	0
1985	0	2	1	0
1986	0	2	2	0
1987	0	2	2	0
1988	0	3	2	0
1989	0	2	2	0
(Cincinnati (Hamilton)				
1984	0	2	2	0
1985	0	2	2	0
1986	0	1	1	0
1987	0	1	1	0
1988	0	4	1	1
1989	0	1	1	1
Columbus (Franklin)				
1984	0	2	2	0
1985	0	2	2	0
1986	0	2	2	0
1987	0	2	3	0
1988	0	2	3	0
1989	0	2	3	0
Dayton (Montgomery)				
1984	0	3	3	1
1985	0	3	3	1
1986	0	4	3	1
1987	0	3	3	1
1988	0	3	2	1
1989	0	3	2	1

	County Commissioners	City Council	Municipal Judges	Common Pleas Judges
Toledo (Lucas)				
1984	0	1	1	1
1985	0	1	0	2
1986	0	0	1	1
1987	0	0	1	1
1988	0	0	1	1
1989	0	0	2	0

162. There are currently eleven (11) minority state representatives in Ohio. The majority of these minority incumbents have served for multiple terms. The minority representatives are, by and large, long term incumbents or enjoy family name recognition. The incumbents and their terms are as follows:

MINORITY STATE REPRESENTATIVES

Troy Lee James	13 terms
C.J. Prentiss	1st term
Vermel Whalen	4 terms
William Mallory	13 terms
Helen Rankin	8 terms
Ray Miller	6 terms
Otto Beatty, Jr.	7 terms
Rhine McLin	2 terms
Tom Roberts	4 terms
Vernon Sykes	5 terms
Casey Jones	12 terms

(Affidavit of William Pfeiffer Ex. 1)

163. As indicated above, most of the 1981 established minority districts fail to meet the population requirements of Article XI, Section 3. These districts include:

CUYAHOGA COUNTY

H.D. 12 - James
H.D. 14 - Prentiss
H.D. 16 - Whalen

HAMILTON COUNTY
H.D. 23 - Mallory
H.D. 25 - Rankin

FRANKLIN COUNTY
H.D. 31 - Beatty

MONTGOMERY COUNTY
H.D. 36 - McLin

164. Defendants' Exhibit 57 is a report of 1981 House Districts with 1990 population showing the deviation of all house districts from the population requirements of Article XI, Section 3 and percentage of Black Voting Age population for the minority districts. This exhibit indicates the population deviation in minority districts.

1981 APPORTIONMENT HOUSE DISTRICTS
WITH 1990 POPULATION

District	Population	Deviation	Percent Black	Percent Black VAP
12	84098	−25469	75.25	71.63
14	91972	−17595	90.39	88.45
16	96258	−13309	94.92	94.23
23	97630	−11937	46.07	39.78
25	99765	−9802	53.34	49.58
29	106537	−3030	38.73	35.00
31	97764	−11803	46.98	42.49
36	115907	6340	42.20	39.75
37	108769	−798	36.29	32.76
42	105536	−4031	35.53	32.01
45	107825	−1742	41.95	37.61

165. Accordingly, most of the districts currently represented by minority incumbents must be reconfigured to must the population requirements of Article XI, Section 3 of the Ohio Constitution.

166. Black voter turnout in minority districts varies by district. Black voter turnout in Cuyahoga County House Districts 12 and 14 is lower than that in other districts. Black voter turnout in H.D. 23 (Mallory) is significantly lower than in any other minority district. Henderson Exhibit 3 indicates the following black voter turnout in the 1990 elections for state representative seats in the districts presently served by a minority candidate.

H.D. 12 (James)	—	25.87%
H.D. 14 (Prentiss)	—	28.33%
H.D. 16 (Whalen)	—	34.30%
H.D. 23 (Mallory)	—	12.63%
H.D. 25 (Rankin)	—	36.10%
H.D. 29 (Miller)	—	34.36%
H.D. 31 (Beatty)	—	31.30%
H.D. 36 (McLin)	—	36.33%
H.D. 37 (Roberts)	—	30.05%
H.D. 42 (Sykes)	—	31.38%
H.D. 45 (Jones)	—	29.53%

167. There exists significant racial bloc voting not only throughout the State of Ohio but also in minority districts. Defendants' Exhibit 108 is a compilation of the results of Dr. King's bivariate ecological regression analysis for minority districts. Every district reflects significant racial bloc voting. The data analyzed again includes both House and Senate districts, statewide and national races. (Transcript of Board Meeting, February 11, 1992, Tr. 46-48).

Defendants' Exhibit 109 reflects the average proportionate vote by race for black incumbent House candidates for the years 1984 through 1990. This exhibit indicates the following:

Ecological Regression Analysis

Average Proportion Voting for Black Incumbent State House Candidates Among:

	Whites [1]	(S.E.)[2]	Blacks [3]	(S.E.)[2]
1984	0.5676	(.0023)	0.9519	(.0023)
1986	0.6022	(.0018)	0.9548	(.0020)
1988	0.6788	(.0027)	0.9846	(.0032)
1990	0.6153	(.0017)	0.9569	(.0020)

[1] An estimate of the proportion of white citizens in districts with a black incumbents who vote for that incumbent.

[2] The standard error, a measure of uncertainty of the corresponding estimate.

[3] An estimate of the proportion of non-hispanic black citizens in districts with a black incumbent who vote for that incumbent.

168. While there is a white crossover voting in the minority districts, except in districts in Cuyahoga County where the current black population in House Districts 12, 14 and 16 exceeds 70%, there is insufficient black population in the minority districts to guarantee the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district. The following is a comparison of data showing total population, Black VAP, total candidate vote, vote from black and white precincts and voter turnout for the minority incumbent districts other than Cuyahoga County. The data is derived from Henderson Exhibit 3, reflecting 1990 election results, and Defendants' Exhibit 57.

District	Total Population	Black VAP	Total Candidate Vote	From Black Precincts	From White Precincts	Voter Turnout
H.D. 23 (Mallory)	97,630	39.78%	14,190	94.20%	57.23%	28.23% White 12.63% Black
H.D. 25 (Rankin)	99,765	49.58%	21,556	94.55%	50.93%	41.02% White 36.10% Black
H.D. 29 (Miller)	106,537	35.0%	15,683	94.24%	51.0%	28.16% White 34.36% Black
H.D. 31 (Beatty)	97,765	42.49%	16,635	95.46%	53.08%	33.05% White 31.30% Black
H.D. 36 (McLin)	115,907	39.75%	18,129	97.69%	36.57%	31.13% White 36.33% Black
H.D. 37 (Roberts)	108,769	32.76%	15,406	94.55%	47.70%	29.26% White 30.05% Black
H.D. 42 (Sykes)	105,536	32.01%	19,238	95.69%	48.79%	40.22% White 31.38% Black
H.D. 45 (Jones)	107,825	37.61%	15,536	92.78%	45.41%	26.60% White 29.53% Black

169. Further, since House Districts 23, 25, 31 and 36 must be reconfigured to meet the population requirements of Article XI, Section 3, and since no election has occurred in such newly reconfigured districts, there is no election data existing to indicate a minimum percentage of black population to ensure the election of black candidates in such districts.

170. Dr. King testified that Mr. Tilling, in preparing the 1991 Apportionment Plan, eliminated packing in the 1981 plan and took fragmented minority votes spread throughout the state and joined them together in order to empower minorities electorally in compliance with the Voting Rights Act. The 1991 Apportionment Plan creates eight (8) minority-majority districts, twice the number in the 1981. (Transcript of Board Hearing, February 11, 1992. TR. 51). Defendants' Exhibit 110 provides:

Rank	Current District	Black Population	Tilling District	Black Population
1	16	0.9467	12	0.6496
2	14	0.9005	10	0.6309
3	12	0.7480	8	0.6119
4	25	0.5320	9	0.5812
5	31	0.4680	30	0.5669
6	23	0.4590	31	0.5243
7	36	0.4210	38	0.5055
8	45	0.4170	21	0.5010
9	29	0.3850	49	0.4737
10	37	0.3610	22	0.4407
11	42	0.3540	11	0.4043
12	15	0.3480	44	0.3932
13	24	0.3230	64	0.3091
14	53	0.2780	39	0.2913
15	32	0.2660	32	0.2150
16	17	0.2614	61	0.1352
17	50	0.1490	54	0.1286
18	18	0.1470	73	0.1071
19	19	0.1440	66	0.1028
20	47	0.1320	1	0.1001

Rank	Current District	Black Population	Tilling District	Black Population
21	59	0.1281	79	0.0840
22	22	0.1260	76	0.0811
23	30	0.1240	26	0.0799
24	27	0.1220	25	0.0791
25	62	0.1164	35	0.0789
26	1	0.1115	23	0.0773
27	52	0.1050	33	0.0748
28	55	0.0990	14	0.0683
29	69	0.0970	45	0.0538
30	64	0.0955	53	0.0521

NOTE: "Black population" is the proportion of the voting age population of a district who are non-hispanic blacks. Proportions underlined are "majority-minority" districts (i.e., greater than fifty percent black).

171. Dr. King analyzed the effect of incumbency in elections in the minority districts for 1984, 1986, 1988 and 1990. Dr. King performed a regression analysis. The standard deviations supporting the accuracy of the regression analysis are presented in Defendants' Exhibit 111. (Transcript of Board Hearing, February 11, 1992; TR. 52).

172. Dr. King testified that it is unreasonable to configure minority districts based on incumbency since the historical election results vary by election, the incumbency advantage shifts with election results each election, and because incumbents may not run in future elections because of retirement, changes in political office, death or any number of other factors. (Transcript of Board Hearing, February 11, 1992, TR. 53-55).

173. Defendants' Exhibit 112 is a regression analysis of the effect of incumbency in elections in the minority districts for 1984, 1986, 1988 and 1990. First, Defendants' Ex. 112 indicates that election results in every minority district for the years analyzed reflect an incumbency advantage on the order of six to ten percent (6-10%). Second, the incumbency advantage in each dis-

trict varies significantly by election. Finally, the predicted vote in all minority districts in all years analyzed indicates that the 1991 Apportionment Plan does not "pack" minorities in house district. (Transcript of Board Hearing, February 11, 1992; TR. 53-55). Defendants' Exhibit 112 provides:

Predicted Election Results
For Districts with Black Incumbent Legislators

Predictions for 1984

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.8852	0.8519	0.7541
14	8	0.8847	0.8239	0.7260
16	12	1.0000	0.8358	0.7379
23	31	0.7083	0.7512	0.6534
25	30	0.6431	0.7525	0.6546
29	22	0.6311	0.6888	0.5910
31	21	0.6892	0.7441	0.6462
36	38	0.6610	0.8022	0.7044
37	39	0.6875	0.7143	0.6165
42	44	0.6889	0.7973	0.6995
45	49	0.7254	0.8235	0.7257
Average Stan. Err.		(0.0564)	(0.616)	(0.0625)

Predictions for 1986

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.8406	0.7826	0.6768
14	8	1.0000	0.7600	0.6542
16	12	1.0000	0.7897	0.6840
23	31	0.6966	0.6934	0.5876
25	30	0.6840	0.7097	0.6039
29	22	0.6739	0.6955	0.5898
31	21	0.6999	0.7434	0.6377
36	38	0.6739	0.7361	0.6304
37	39	0.6544	0.6798	0.5741
42	44	0.6801	0.7489	0.6432
45	49	0.7277	0.7753	0.6696
Average Stan. Err.		(0.0562)	(0.0628)	(0.0638)

Predictions for 1988

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.8403	0.7742	0.6374
14	8	1.0000	0.7546	0.6178
16	12	1.0000	0.7686	0.6318
23	31	0.6890	0.7119	0.5751
25	30	1.0000	0.7260	0.5892
29	22	0.6939	0.7026	0.5658
31	21	0.7217	0.7366	0.5999
36	38	0.7096	1.0000	0.6040
37	39	0.9909	0.7072	0.5704
42	44	0.6444	0.7623	0.6255
45	49	0.7450	0.7829	0.6461
Average Stan. Err.		(0.0564)	(0.0629)	(0.0641)

Predictions for 1990

District		Prediction [1]		Prediction when
Current	Tilling	Current	Tilling	Contested & Open [2]
12	10	0.9071	0.8756	0.8067
14	8	0.8419	0.8377	0.7688
16	12	0.9255	0.8786	0.8098
23	31	0.7214	0.7597	0.6909
25	30	0.7296	0.8326	0.7638
29	22	0.6976	0.7782	0.7094
31	21	0.7413	0.8683	0.7995
36	38	0.7077	0.8640	0.7952
37	39	0.6834	0.7551	0.6863
42	44	0.6512	0.8498	0.7810
45	49	0.7428	0.8866	0.8178
Average Stan. Err.		(0.0586)	(0.0634)	(0.0649)

NOTE: Predictions are estimates of what the Democratic proportion of the two-party vote would be under the specified conditions.

[1] Predictions under the current districts are duplicated (for comparison) from Table 1. To calculate predictions under the Tilling plan, the results of the regression analysis described at the foot of Table 2 were used with the analogous explanatory variables calculated under the Tilling plan.

[2] These columns report district predictions of the Democratic proportion of the two-party vote in a hypothetical situation in which candidates in these elections were non-incumbents and faced an opposition candidate.

174. Accordingly, unless Black Voting Age Population margins are adopted in minority districts, minorities risk losing minority districts due to factors such as changes in population, demographics, incumbency factors, campaign funding and contest of seats.

175. Both BEDO and the NAACP have taken the position that it is unreasonable to configure districts based on incumbency. Dana Mattison testified:

> Q. Now, going back to Hamilton County just briefly for a second, same situation, Rankin and Mallory have been representatives elected over a long period of time and yet you increased the percentage of black population.
>
> A. Uh-huh.
>
> Q. Why is that?
>
> A. Again, this is an individual district-by-district examination. We believe that communities that respond behave differently based on a whole range of circumstances. Again, understand that Representative Rankin came to that district after her husband passed away, and there is a long-standing relationship with voters, but that does not mean that the trends indicate that that's going to continue over time, and what we tried not to do was to construct districts based on incumbents. That just was not the reasonable thing to do.
>
> Q. Voting Rights Act does not protect incumbents?
>
> A. That's right.
>
> Q. It protects voters.
>
> A. And opportunity to elect candidate of choice.
>
> Q. And just to wrap things up, same thing for Franklin County, Beatty and Miller are representatives who have been elected for terms yet you increased the black population?
>
> A. See, we did not look at the issue of the individual and how much they had won other than to

try and get a sense of the history of voting patterns and I know that sounds a little antithetical but you've got to have some sense of the history of how voters have behaved in that district.

(Defendants' Ex. 98, TR. 72, 73)

176. Floyd Johnson testified on behalf of the NAACP as follows:

Q. All right. And Representative Miller's district was an influence district that—strike that—was also a majority minority district in terms of black voting age population?

A. Let me respond to that this way. We at the NAACP approached these as simply legislative districts and not necessarily districts for Mr. Beatty. And our objective was to create majority minority legislative districts and influence districts and not draw districts for individual elected officials.

(Defendants' Ex. 97, TR. 41)

177. Finally, Mr. Tilling also adopted the position in configuring districts that districts should not be configured based on incumbency. Mr. Tilling testified:

And we tried, as the Voting Rights Act makes clear, to draw the districts to protect a class of voters, not the particular incumbent in that situation. And that's why we basically added additional minority votes to that district, not because Casey Jones needed them but because down the road in this decade whoever is his successor needs the opportunity to give minorities a clear chance to elect a candidate of their choice.

(Defendants' Ex. 96, TR. 86)

178. Despite the fact that Representative Mallory, a black incumbent, has been elected with less than a majority of black population in H.D. 23, BEDO determined to increase the relative percentage of black population in

reconfiguring the district in accordance with totality of circumstances factors. Mr. Mattison testified:

> Q. Under the BEDO plan then why was black population added to Mr. Mallory's district.
>
> A. Well, you understand the need for attempting to balance this out. As I indicated, well, started to indicate to you, we began with a premise of 50.1 percent, the technical definition of majority. We then looked at circumstances that might impact either positively or negatively on the ability of that elected official to be elected and for those individuals to elect candidate of choice. We looked at such things as population drift. In his district, unfortunately as is true in a number of intercity urban districts there is population drift, and that population drift we felt needed to be looked at and compensated for over the decade in which that plan would be applicable.
>
> (Defendants' Ex. 98, TR. 32, 33)

179. BEDO's determination to increase relative black population in House District 23 was based on voting patterns, economic trends, and population drift. Mr. Mattison testified:

> Q. And you BEDO determined to add population to Mr. Mallory's district in a relative configuration that would increase the relative black population of his district?
>
> A. To an appropriate level based on our examination of totality of circumstances.
>
> Q. And that was because of your understanding of the requirements of the Voting Rights Act; is that correct?
>
> A. And our understanding generally of the need to empower the African-American communities, so I suppose the answer to that is yes, but we used again more than voting rights because as I indicated in my earlier testimony we examined economic issues and

those issues may still be in question in terms of their voting rights applicability, but we felt it was an important dynamic.

Q. Okay. Why didn't you just leave the relative percentage of 45 percent since Mr. Mallory has a history of being elected?

A. Well, as I said to you we took a look at a number of circumstances. What was the percentage of black/white, the relative percentage of black/white population drift out of the district? Were more black people moving out? Were more white people moving out? All of these things were weighted and examined and we made a determination after an examination of all of those circumstances, voting patterns, everything, economic trends in the district, we felt that the 55 percent was the most appropriate level. And, again, this was in consultation with the person who understands that district best and in the absence of the kind of detailed analysis that has traditionally been recognized by the court system that is a retrogressive sudy or the examination of best- and worst-case scenarios.

(Defendants' Ex. 98, TR. 34 and 35)

180. BEDO's determination to increase the relative black population of the minority incumbent districts was supported by Representative Mallory and all currently elected black officials. Mr. Mattison testified:

Q. Did you discuss House District 23 with Mr. Mallory before it was created?

A. Absolutely.

Q. Did he go along with your recommendation?

A. Yes, as was the case with all of the currently sitting black elected officials.

(Defendants' Ex. 98, TR. 38)

181. Floyd Johnson, on behalf of the NAACP, discussed minority districts with Representative Mallory in

his capacity as President of BEDO. Mr. Mallory's instruction was to increase and expand minority-majority districts. Mr. Johnson testified:

> Q. First of all, Bill Mallory in his capacity as president of the Black Elected Democrats of Ohio, did he express a goal or objective or purpose of the Black Elected Democrats of Ohio in terms of what they were attempting to do in reapportionment?
>
> * * * *
>
> A. His instruction to me was to increase and expand.
>
> Q. In what, in terms of what?
>
> A. In terms of minority representations, in terms of minority districts.
>
> Q. Okay. Did he take a position as to the affirmative creation of minority majority districts?
>
> * * * *
>
> A. His instructions to me were to create as many districts as possible. It was my understanding he fully supported what we were attempting to do.
>
> Q. Okay. When you say create as many districts are you referring to majority minority districts?
>
> A. That's correct.
>
> (Defendants' Ex. 97, TR. 43, 44)

182. Mr. Johnson increased the relative percentage of black population in House District 23, Representative Mallory's district, even though Representative Mallory has been elected in the district with less than a majority of black population. Mr. Johnson did so because Mr. Mallory's tenure is 26 years and a new black candidate would have less of an opportunity for election in the district because of a lack of incumbency advantage. Mr. Johnson testified:

Q. Did you increase the percentage, relative percentage of black population, in Mr. Mallory;s district? And I don't mean Mr. Mallory's district, but in the district he was serving.

A. We did.

Q. Okay. And why did you do that?

A. The NAACP's position is to try to create opportunities for minorities to continue in the Ohio State Legislator. And since Mr. Mallory's tenure was close to 26 years he may or may not be in the legislature in the year 2000.

So our thinking was to create a district where a minority could represent the district that Mr. Mallory represents even after his retirement.

Q. Well, I guess—let me phrase the question this way.

Some may contend, Mr. Johnson, that Mr. Mallory's district—strike that.

Some may contend that the district served by Mr. Mallory does not require an increase in black population because Mr. Mallory has been elected over a series of terms, a black candidate. What is your response to that?

A. Because of the historic polarized voting a candidate, a new candidate, minority candidate running in the same district, may have less of an opportunity first time out of getting elected because they lack incumbency. And that was the rationale in drafting and increasing slightly the minority proportion in his district.

(Defendants' Ex. 97, TR. 45, 46)

183. Mr. Tilling, in drafting the 1991 Apportionment Plan, also determined that the Voting Rights Act protected classes of voters not incumbents. Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 to increase the relative percentage of black population in that district in order

to provide an opportunity for a new black candidate, without benefit of incumbency, to be elected in the district. Mr. Tilling testified:

> Q. All right. Why would you increase the black—relative black population of Representative Mallory's district?
>
> A. I really can't speak for why the minority did that, although it is true that Mallory is the president of BEDO. But I doubt if that is the reason.
>
> The only thing I can say about the plan submitted to us by the NAACP and the plan we drew ourselves, which also had a similar increase in Representative Mallory's district, again Representative Mallory has been a representative for more than 20 years. He is in his 60s. And since we are trying to create districts that would protect a class of voters, not the incumbent, we were in effect looking ahead to the time when perhaps Representative Mallory would not be there and running for reelection.
>
> Q. Was Mallory's district, that is prior District 23, one of those districts that had to be reconfigured in any event because of population requirements?
>
> A. I believe it was.

(Defendants' Ex. 96, TR. 107, 108)

184. BEDO also increased the relative percentage of black population in House District 25. Representative Rankin's District, even though Representative Rankin has been elected over a number of terms. Mr. Mattison testified that this was done to avoid minority vote dilution:

> Q. Okay. Now, in State Representative Rankin's district under the BEDO plan the black population increased from 53 percent in 1981 in that district to 61 percent in Rankin's district under the BEDO plan; is that correct?
>
> A. That's correct.

Q. Why did you make that increase? Why do you provide for that increase in black population?

A. The same answer as on the first. After an examination of totality of circumstanes we felt that that was the number necessary to avoid dilution.

(Defendants' Ex. 98, TR. 54).

185. With regard to both H.D. 23 and 25, Mr. Mattison testified:

Q. Why didn't BEDO maintain minority districts as they were in 1980 with a spread of black population of 12.20 percent up to 53 percent as opposed to creating two districts at 47 and 57 percent and taking black population from the remaining districts?

A. Well, primarily because of our understanding of totality of circumstances much of which was new to the political arena vis-a-vis the 1982 amendment to the Voting Rights Act that wasn't present in 1980, and based on our assessment these were the numbers that were required to comport with our understanding of the requirements.

(Defendants' Ex. 98, TR. 55, 56)

186. Mr. Johnson, the NAACP's representative, testified that House District 23 should be increased in black population even though Representative Rankin has been elected in the district. Representative Rankin not only benefits from incumbency but also name recognition. A new black candidate would require a district with increased black population to be successful. Mr. Johnson testified:

Q. And with regard to the districts presently served by Representative Rankin what did you do with that district?

A. Approximately 55 percent majority minority, so that was slightly increased.

Q. Okay. And slightly increased in terms of black population as a percent?

A. That's correct.

Q. Okay. And why did you slightly increase the black population as a percent of total population in the districts presently served by Representative Rankin?

A. Using the same principle as Representative Mallory, the district that he currently serves, Helen Rankin took over from her husband and she is getting on up in years, so she may or may not be the representative in the year 2000, so giving an opportunity for the next generation of blacks who might want to seek office in Ohio Legislator.

(Defendants' Ex. 97, TR. 46, 47)

187. Mr. Tilling, in drafting the 1991 Apportionment Plan, adopted the same rationale in increasing the relative black population of Representative Rankin's district. (Defendants' Ex. 96, TR. 105-106.

188. In Franklin County, BEDO increased the relative black population of House District 29 (Miller) and 31 (Beatty) even though these Representatives have been elected for years in districts with less than a majority black population. Mr. Mattison testified:

Q. So you increased Ray Miller's district more than the majority did in adopting the '91 plan?

A. In this particular case.

Q. Well, tell me generally why you went from 38 percent to 50 percent in Ray Miller's district?

A. Well, again, we looked at the totality of circumstances, looked at a number of issues and came to the conclusion that these were the figures necessary again to comply with our understanding of the Voting Rights Act.

(Defendants' Ex. 98, TR. 58)

* * * *

Q. In this district (Beatty's) if we look at the comparison we move from 46 black population to 52 percent black population in the BEDO plan, correct?

A. Correct.

Q. And why did you provide for that increase?

A. Based on an assessment of totality of circumstances we believe that 52 percent to be required and necessary based on our assessment.

Q. Okay. Total population is 104,972 under the BEDO plan, 106,608 under the majority plan, correct?

A. (Witness nods head.)

Q. You'll have to answer audibly.

A. Yes.

Q. And you discussed that change with Mr. Beatty and he agreed to it?

A. As I said we discussed all the plans with each of the members.

Q. The net effect of what you did was to make Beatty's district a majority minority district in terms of a percentage over 50 percent rather than Miller's?

A. Well, again that is not our definition of majority minority, it's not based on absolute numbers.

Q. In any event Mr. Beatty's district being a district of over 50 percent, Mr. Miller's remained a district of less than 50 percent. Why did you do it that way as opposed to making Miller a district over 50 percent and Beatty not?

A. Totality of circumstances indicated to us that those figures were the most appropriate figures under the circumstances and based again on our analysis.

(Defendants' Ex. 98, TR. 63, 64)

189. Mr. Tilling, in drafting the 1991 Apportionment Plan, reconfigured House Districts 29 and 31 in Franklin County to protect minority voters in those districts and to create a minority Senate District in Franklin County where none previously existed. He testified:

The difficulty that we faced here is that there were several indications that one or both of these individuals would desire to run for a different office. Representative Beatty had been talked about as a possible candidate for State Senate; Representative Miller sought the Democrat nomination for Secretary of State in 1990 and was encouraged by party leadership to stay in place but has made no secret of the fact he would like to run for another office down the road.

It's our judgment the Voting Rights Act really requires you to try to protect classes of voters and not particular incumbents. And since there was some concern that one or both of these individuals might not serve out the decade we tried to reconfigure the districts in accordance with our understanding of the Voting Rights Act but yet do as little to change them as we thought was necessary—in other words, to make the minimum changes necessary to achieve the requirements of the Voting Rights Act.

And so as you can see, the black voting age population in District 21, which would be the new district that Representative Beatty is in, is just barely over 50 percent. And that was done in such a way that it did not decrease the minority population in Representative Miller's district. In fact, we were able to add minority voters to his district as well. Therefore I believe we have protected the ability of minority voters in both those House districts to elect a candidate of their choice, regardless of the plans, of the current two incumbents.

In addition to that I might point out, although we're not talking directly about the Senate, we also were informed at the public hearings in Columbus that one of the complaints the minority community had was that the previous House districts were con-

figured in such a way as to work against the ability of minorities to elect a candidate of their choice to the State Senate. And so as we were trying to reconfigure the House districts into a Senate district we tried to take that into consideration. And I do believe that we created a State Senate district here in Franklin County for the first time that gives minorities a chance to elect a candidate of their choice. And currently the Senate Democratic caucus is in the process of filling a vacancy and the candidate recommended for that position is a black woman. And she has been recommended to the Senate Democrats by the Franklin County Screening.

Q. What Senate district is that?
A. It would be Senate District 15.

(Defendants' Ex. 96, TR. 103-104)

190. Since the deposition of Mr. Tilling, the Senate Democratic Caucus has appointed Ben Espy, former member of the Columbus City Council, as a minority appointee to Senate District 15.

191. In Montgomery County, BEDO increased the relative black population in both House District 36 (McLin) and House District 37 (Roberts) even though these minority Representatives have been elected in districts with less than a majority black population. The factors considered included population drifts, voting trends and relative shifts in black population between the districts. Mr. Mattison testified:

Q. Why did you increase Roberts' district in terms of black population?

A. Based on our assessment of totality of circumstances.

Q. But Roberts has been elected with 36 percent black population.

A. Well, again, there are a number of circumstances just beyond the issue of electability. There

is also population drift in his district in such position that in five years he will lose the necessary numbers. Those kind of issues were all examined in totality of circumstances, and quite frankly his own assessment of voting trends, what kind of folk in fact were moving in. The crossover voting issue was also discussed with each of the members by Dr. Brisker as he went around the State to do this assessment.

Q. Did you, when you were considering totality of circumstances in Montgomery County did you consider the fact that McLin's district was losing black population to Roberts' district?

A. Yeah, we knew that, that that was occurring but again there is an overall drift in McLin's district towards the southern suburbs. So that the population numbers didn't really tell the story.

Q. But you had to take into account the fact that Roberts—McLin's district was losing black population and Roberts' district was increasing black population?

A. That's right, but we also took into consideration voter turnout and the fact that in McLin's district a strong GOTV machine had been built by the late State Representative C.J. McLin so that the percentage of the voting behavior of those African-Americans in that district was proportionately greater than in Representative Roberts' district.

(Defendants' Ex. 98, TR. 70-72)

192. Floyd Johnson, in drafting the NAACP, also took into account population shifts in Montgomery County in recommending a relative increase in black population in House District 36 (McLin). He testified:

There has been on the books in Montgomery County since 1960 a proposed U.S. 35 West project. And during the last five years a portion of that family was built. And approximately 20,000 residents dur-

ing that ten-year period were displaced. Over the next ten years we anticipate that U.S. 35 West will join with what is called the Trotwood connector in which a substantial portion of the population will be displaced, and that population would be in the proposed district—in the plan that we recommended—that currently Rhine McLin serves in.

So taking that into consideration, the reason that we attempted to maintain the majority minority district in the one that Ms. McLin currently represents, is that once that population is displaced then the district in which Tom Roberts represents will then become the minority majority because of the historical movement of the black population from the eastern part of the Dayton area to the northwest corridor, which is now the City of Trotwood, which increased from a 25 percent black population to 45 percent black population, 44 percent black population over the past ten years. If the migration continues then once the highway is extended then those people will move into Roberts' district.

Q. Would it be fair—I am sorry, were you done?

A. I am done.

Q. Would it be fair then to say that based on the demographics in Montgomery County there is movement of black population from the district currently served by Representative McLin into the district served, currently by Representative Roberts?

* * * *

A. Absolutely.

Q. And is that why you came to the final conclusion you did on the relative percentages of black population in each one of those districts?

* * * *

A. That's correct.

(Defendants' Ex. 97, TR. 48-50)

193. In drafting the 1991 Apportionment Plan, Mr. Tilling also took into account the population shifts in Montgomery County in reconfiguring districts in that county. He testified:

> And based on our judgment, which actually was again the plan—we accepted the plan that they prepared. We decided to preserve the Rhine McLin district with a slight plurality black voting age population because our understanding of the circumstances is that the population movement is from the McLin district to the Roberts district and therefore over the decade that gave us the best opportunity to retain essentially the same population figures that we have as we began this process.
>
> Q. Okay. McLin's district, 36, is that a district that met the population requirements?
>
> A. No. Her district had too many people in it and we had to remove people from the district.
>
> Q. And so did you reconfigure that district?
>
> A. Yes, we did.
>
> Q. And did you reconfigure it in order to avoid dilution by minority voting.
>
> A. Yes, we did, especially as I said in light of population trends throughout the decade.
>
> Q. In this situation the black population percentage in 1981 went from 36.10 percent in your plan to 32.35 percent. Why was that done?
>
> A. Well, as I indicated, I think basically the situation was such that because Rhine McLin essentially was—I should say succeeded her father and basically had a minority district, we were able to make relatively few changes there. But in order to barely give her the majority black voting age population, 50.7, which is, we felt, the least that we needed to do and because that's where the black population is now and therefore she is entitled to retain that, we essentially gave her a boost at the beginning of the decade because as this decade unfolds she is going to

lose that population and white population in the district may grow at a faster rate and therefore her population, if we didn't increase it now, it would fall dangerously low and possibly jeopardize her chances for reelection.

(Defendants' Ex. 96, TR. 109, 110)

194. In Summit County, both BEDO and the NAACP increased the relative percentage of black population in House District 42 (Sykes) based on the fact that the district was losing black population and to avoid minority vote dilution. (Defendants' Ex. 78, TR. 75; Defendants' Ex. 97, TR. 50). Mr. Tilling testified:

Again in Summit County we had a district represented by Vern Sykes, and according to the 1990 census his black population figure was 35.4 percent. We increased that to 43 percent, but again black voting age population was just slightly under 40. So we did try to prevent a black voter dilution by returning the minority community to Representative Sykes and Democrats did a very similar thing. In fact, they increased his to a higher level than ours, 47 percent in their figures as compared to 43 in ours. Both sides recognized the need to reconfigure those districts. And I am not sure what explains why they have about three and a half percent more, but the fact of the matter is both sides recognized that was the appropriate course of action.

(Defendants' Ex. 96, TR. 111)

195. In Lucas County, BEDO increased the relative percentage of blacks in House District 45 (Jones) due to population changes in the district. Mr. Mattison testified:

Q. Was there anything specific under totality of circumstances?

A. Again, there were a whole list of things ranging from the growth of a university center that was

in Representative Jones' district. I remember that was one of the issues. He had the University of Toledo and the growth of that university had essentially displaced a number of individuals who resided there and that it caused some shift in terms of the kind of population that were in his district. So that was one of the things we looked at.

(Defendants' Ex. 98, TR. 80, 81)

Mr. Tilling accepted this rationale as well as the age of the minority incumbent in reconfiguring House District 45. (Deposition of Tilling, Defendants' Ex. 96, TR. 112).

196. In short, reconfiguration of minority districts must take into account population shifts, demographics, voter turnout, racial bloc voting, incumbency factors, voting patterns, and other totality of circumstances factors.

5. *Roll Call Analysis*

197. Plaintiffs in *Quilter v. Voinovich* offered a "roll call analysis" to attempt to establish white Democratic incumbents support for legislation of interest to minorities. The roll call analysis was prepared by a Lisa Handlee who was never called as a witness by Plaintiffs and whose deposition was, therefore, not taken. Gordon Henderson knew nothing of the roll call analysis. (Deposition of Henderson, Defendants' Ex. 99, TR. 197-199).

198. Defendants' Exhibit 62 is a roll call analysis prepared by James R. Tilling. The analysis indicates strong Republican support for bills of interest to minorities. Absent Republican support in the Senate, the bills would never have been passed. (Defendants' Ex. 96, TR. 114-126).

III. EQUAL PROTECTION/FOURTEENTH AMENDMENT

A. Alleged Political Gerrymandering

199. Defendants' Exhibits 60 and 61 are comparisons of the allegedly Democratic leaning and allegedly Republican leaning districts in the 1991 Apportionment Plan and the 1991 Minority Plan proposed by Plaintiffs' Ferguson and Quilter. The comparisons are based on the Political Index relied upon by Plaintiffs when they argued that the 1991 Apportionment Plan was a political gerrymander. Defendants' Exhibit 60 summarizes the results in the two plans for all major urban counties in Ohio. (Defendants' Ex. 96, TR. 114-126). Defendants' Exhibit 60 provides:

	1991 Majority Plan		1991 Minority Plan	
	Democrat	Republican	Democrat	Republican
Cuyahoga	10	3	11	2
Franklin	3	6	3	6
Hamilton	2	6	2	6
Montgomery	2	4	3	3
Lucas	3	2	4	1
Summit	3	2	2	3
Total	23	23	25	21

(Defendants' Ex. 60)

200. Using the Plaintiffs' proposed analysis, there is only a two (2) seat difference in the 1991 Apportionment Plan and the plan submitted by Messrs. Ferguson and Quilter in the six (6) major urban counties in Ohio. Under the 1991 Apportionment Plan, 23 Republican leaning and 23 Democratic leaning districts were created, based on the Political Index relied upon by Plaintiffs. This compares to 25 Democratic and 21 Republic leaning districts in the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Deposition of James R.

Tilling, Defendants' Ex. 96, TR. 114-126; Defendants' Ex. 60). Plaintiffs' expert, Robert Dykes, admitted this difference. (Deposition of Robert Dykes, December 13, 1991, Defendants Ex. 100, TR. 44).[8]

201. Statewide, using the Plaintiffs' measurements, there is only a difference of four (4) seats in the 1991 Apportionment Plan and the 1991 Minority Plan proposed by Messrs. Ferguson and Quilter. (Defendants' Ex. 96, TR. 131). Defendants' Exhibit 68 compares the results in the two plans, again based on Plaintiffs' Political Index. The results are:

1990 Statewide Races

1991 Majority Plan	**58 R - 41 D**
1991 Minority Plan	**54 R - 45 D**

202. According to the Plaintiffs' measurements, there is only a possible four (4) seat difference in the 1991 Apportionment Plan and the plan offered by the Democrats based on Plaintiffs' Political Index and the 1990 statewide races. (Defendants' Ex. 68; Defendants' Ex. 96, TR. 130, 131).

203. Plaintiffs' expert, Robert Dykes, admitted that the difference statewide was only five (5) seats by his personal calculation. (Deposition of Dykes, December 13, 1991, Defendants' Ex. 100, TR. 44).

204. There are currently 61 Democrats and 38 Republicans in the Ohio House of Representatives. (Defendants' Ex. 67; Defendants' Ex. 96, TR. 128).

205. In the 1990 statewide races (Governor, Treasurer, Secretary of State, Attorney General and Auditor), the vote statewide was split 52% Democratic and 48% Republican. (Defendants' Ex. 96, TR. 133).

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[8] The deposition of Robert Dykes taken on December 13, 1991 is submitted as Defendants' Exhibit 100.

206. There is no correlation in the current political make-up of the Ohio House of Representatives and the political climate in Ohio based on the 1990 statewide races. (Defendants' Ex. 96, TR. 126-128).

207. A four seat difference statewide between the 1991 Apportionment Plan and the 1991 Minority Plan as prepared by Plaintiffs' Ferguson and Quilter does not establish political gerrymandering particularly where the current membership in the Ohio House is 61 Democrats and 38 Republicans. (Defendants' Ex. 96, TR. 126-128; Defendants' Exs. 67 and 68).

208. The 1971 and 1981 apportionment plans are gross partisan Democratic gerrymanders. (Defendants' Ex. 95, TR. 7).

209. Campaign financing and incumbency are significant factors in any election. The Democrats currently have the edge in both, having 61 members in the Ohio and $3 to $4 million in available funds for House campaigns compared to $200,000 for Republicans. (Defendants' Ex. 96, TR. 126-128).

B. Reliance On The Political Index For 1990

210. Gordon Henderson, Plaintiffs' expert in *Quilter v. Voinovich*, analyzed the political leanings of the districts configured in the 1991 Apportionment Plan based on a Political Index, calculated as the average of the 1990 statewide races. (Deposition of Henderson, Defendants' Ex. 99, TR. 95).

211. Gordon Henderson only reviewed two (2) out of eighty-eight (88) counties for his conclusions. These counties were Hamilton and Franklin. (Henderson Exhibits 14 and 16; Deposition of Henderson, Defendants' Ex. 99, TR. 43, 194).

212. Henderson never employed the Political Index in any court proceeding previously. (Deposition of Henderson, Defendants' Ex. 99, TR. 81). Henderson never testified in a court proceeding where claims of political gerry-

mandering were upheld. (Deposition of Henderson, Defendants' Ex. 99, TR. 81).

213. Regarding the only two (2) counties analyzed by Mr. Henderson, Hamilton and Franklin, the ultimate results indicated that the 1991 Apportionment Plan created three (3) Democratic leaning districts and six (6) Republican leaning districts in Franklin County and two (2) Democratic leaning and six (6) Republican leaning districts in Hamilton County—*precisely* the same configuration as created in the 1991 Minority Plan proposed by the Democrats themselves. (Defendants' Ex. 60; Defendants' Ex. 96, TR. 114-126).

214. Henderson never reviewed the results in the Ohio Senate. (Deposition of Henderson, Defendants' Ex. 99, TR. 105).

215. Henderson analyzed districts in Hamilton and Franklin County and attempted to trace "pieces" in the districts in the reconfiguration. Henderson conceded that districts must be reconfigured because of the population requirements of the Ohio Constitution. (Deposition of Henderson, Defendants' Ex. 99, TR. 192). Henderson also conceded that districts were similarly reconfigured in the 1991 Minority Plan proposed by the Democrats. (Deposition of Henderson, Defendants' Ex. 99, TR. 159).

216. Henderson performed no analysis of the requirements of the Ohio Constitution, although acknowledging on cross examination that Article XI, Sections 10(C), 8 and 11 addressed the allocation of fractions of counties in the apportionment process. (Deposition of Henderson, Defendants' Ex. 99, TR. 131, 158).

217. Henderson conceded that population shifts in Hamilton and Franklin County districts would require reconfiguring the districts, conceding that "Population shifts are exactly what mandate a new redistricting plan". (Deposition of Henderson, Defendants' Ex. 99, TR. 131, 158).

218. Henderson could not correlate the "pieces" of districts in the 1991 Apportionment Plan that were reconfigured, and offered no support whatsoever as to how these "pieces" correlated with wards and precincts. (Deposition of Henderson, Defendants' Ex. 99, TR. 163). Henderson conceded that in order to meet population requirements for the districts, districts had to be reconfigured by wards and precincts. He testified:

> Q. In order to meet population requirements for any given district you may have to reconfigure that district by adding or subtracting wards and precincts to come up with the population requirement, itsn't that true?
>
> A. That may happen, sure.
>
> (Deposition of Henderson, Defendants' Ex. 99, TR. 164).

219. In reply, James R. Tilling testified that in order to meet population requirements and to avoid minority voter dilution as proscribed by Section 2 of the Voting Rights Act, districts in Hamilton and Franklin County, as well as all major urban counties, had to be substantially reconfigured. (Defendants' Ex. 96, TR. 161).

220. Henderson's reliance on a Political Index on statewide elections for one year is absurd. A Political Index may vary widely depending on the results of the races at the statewide level. (Defendants' Ex. 96, TR. 131). Defendants' Exhibit 68 compares the Political Index and results in Ohio House compositions for the years 1982, 1986, 1988 and 1990. Defendants' Exhibit 68 indicates the following results:

	1990 Statewide Races	1988 Statewide Races	1986 Statewide Races	1982 Statewide Races
1991 Majority Plan	58R-41D	59R-40D	83D-16R	69D-30R
1991 Minority Plan	54R-45D	53R-46D	81D-18R	72D-27R

221. Accordingly, Plaintiffs' Political Index based on the average of the 1990 statewide races would indicate 58 districts leaning Republican and 41 districts leaning Democratic in the 1990 Majority Plan while, in 1986, for example, the Political Index, calculated in the same fashion, would indicate 83 districts leaning Democratic and 16 Republican for the same apportionment plan. (Defendants' Ex. 68).

222. Plaintiffs' reliance on a Political Index to indicate the political leaning in any given house district is ridiculous since such a Political Index, based on an average of the statewide races, bears no correlation to the results in the Ohio House and since a Political Index varies dramatically by year based on the results of statewide elections. A Political Index based upon a single election cycle is simply not an accurate prediction of the political profile of any house district in any future election. (Defendants' Ex. 96, TR. 128, 130-131).

223. The 1991 Apportionment Plan was adopted on October 1, 1991 and published on October 5, 1991. (Defendants' Ex. 96, TR. 34, 35). Therefore, the 1991 Apportionment Plan has not yet been effective to govern any election.

C. *Partisan Bias*

224. Dr. Gary King, Defendants' expert, conducted an analysis of the partisan bias in the 1981 apportionment plan, the 1991 Apportionment Plan (the "Tilling Plan"),

the 1991 Democrats' Plan and the 1991 plan submitted by the Ohio Republican Party. (Deposition of King, Defendants' Ex. 95, TR. 14).

225. Dr. King performed this analysis based on district and precinct level data for Ohio House and Senate elections. (Defendants' Ex. 95, TR. 7).

226. Dr. King conducted the analysis of partisan bias by use of a seats/vote curve, a methodology standardly accepted in the field for over 100 years. (Defendants' Ex. 95, TR. 13, 14).

227. Partisan bias is measured by partisan symmetry. Partisan symmetry provides that political parties are treated fairly in the electoral system if votes are symmetrical to the number of seats awarded in an election. (Defendants' Ex. 95, TR. 16).

228. The seats/votes curve methodology is a regression methodology. Dr. King conducted a regression analysis and then calculated the variance around the seats/votes curve with standard deviations. (Defendants' Ex. 95, TR. 21).

229. Defendants' Exhibit 88 is an analysis of the 1971 and 1981 apportionment plans prepared by the Democrats in prior apportionments for the Ohio House. The analysis indicates that the 1971 and 1981 apportionment plans were heavily biased in favor of the Democrats in the Ohio House. (Defendants' Ex. 95, TR. 28-30).

230. Indeed, the 1971 apportionment prepared by the Democrats is the most partisan plan ever recorded in the political science literature. The 1981 apportionment plan prepared by the Democrats is also significantly biased in favor of the Democrats. See Dr. King's article "Estimating Federal Consequences of Legislative Redistricting" published in the *Journal of American Statistical Association*. (Defendants' Ex. 95, TR. 7).

231. Defendants' Exhibit 90 reflects the results of Dr. Kings' analysis for the four plans in question for the Ohio House. The analysis indicates that both the 1981 apportionment plan and the 1991 plan proposed by Plaintiffs Ferguson and Quilter are heavily biased in favor of the Democrats. The 1991 plan offered by the Ohio Republican Party is biased in favor of the Republicans. However, the 1991 Apportionment Plan (the "Tilling Plan") is not biased in favor of any political party. (Defendants' Ex. 95, TR. 33-34).

232. The results of Dr. King's analysis indicates that the 1991 Apportionment Plan reflects an average partisan bias of only -0.006, less than the standard error of .011. Accordingly, the 1991 Apportionment Plan is very nearly perfectly fair. (Defendants' Ex. 95, TR. 34).

233. Defendants' Exhibit 91 reflects the results of Dr. King's analysis for the Ohio Senate. Again, the 1981 Apportionment Plan cannot be statistically distinguished from zero partisan bias. (Defendants' Ex. 95, TR. 37).

234. The results of Dr. King's regression analysis indicates that the 1991 Apportionment Plan is statistically indistinguishable from zero partisan bias for both the Ohio House and Senate, is fair and is not a partisan gerrymandered plan. (Defendants' Ex. 95, TR. 34, 37). See also Transcript of Board Hearing, February 11, 1992. TR. 46-55.

D. *Paired Incumbents*

235. In preparing the 1991 Apportionment Plan, Mr. Tilling did not intentionally pair any incumbents. Mr. Tilling intended to create a fair plan because he anticipated that the plan could be the subject of a judicial proceeding. (Defendants' Ex. 96, TR. 135, 136).

236. In Cuyahoga County, incumbents have to be paired in one district because Cuyahoga County lost one

whole house district as a result of the 1990 census. (Defendants' Ex. 96, TR. 140).

237. In Mahoning County, Representatives Vukovich and Gerberry are paired as a result of the court's order in *Armour v. State of Ohio.* Plaintiffs Ferguson and Quilter also paired Vukovich and Gerberry in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter as proposed. (Defendants' Ex. 96, TR. 138).

238. In the 1991 Minority Plan, Plaintiffs Ferguson and Quilter themselves paired eight (8) representatives. They paired Representatives Whalen and Bergansky, Representatives Campbell and Sheerer, Representatives Mahnic and Mottl; Representatives Conley and Davidson and Representatives Vukovich and Gerberry. (Defendants' Ex. 96, TR. 138).

239. Mr. Tilling did not realize that incumbents were paired in the 1991 Apportionment Plan until after September 26, 1991 when the proposed plans were submitted. Between September 26 and October 1, 1991, Mr. Tilling modified the Majority Plan to *unpair* incumbents wherever possible. Specifically, Tilling unpaired Representatives Mottl and Colonna. Representatives Pringle and Sweeney and Representatives Whalen and James—all Democrats. (Defendants' Ex. 96, TR. 136, 138, 181).

240. Only three pairs of incumbents remain paired today. In all the remaining pairs of incumbents, one incumbent has elected to move to another district. The only pairs of incumbents remaining are Representatives Campbell and Sheerer, Representatives Skeen and Seese and Representatives Gerberry and Vukovich. (Deposition of W. Pfeiffer, December 14, 1991, TR. 7-9).

IV. OHIO CONSTITUTIONAL ISSUES

241. The Ohio Supreme Court, in *Voinovich v. Ferguson* (1992), —— Ohio St. 3d —— held that the 1991 Apportionment Plan complies with Article XI of the

Ohio Constitution. The persons responsible for apportionment address the Ohio Constitutional issues without waiver of their position that the Federal District Court in *Quilter v. Voinovich* must follow the decision of the Ohio Supreme Court. The following findings are provided without waiver of this position.

242. Article XI, Section 7(A) provides:

> (A) Every house of representatives district shall be compact and composed of contiguous territory, and the boundary of each district shall be a single nonintersecting continuous line. *To the extent consistent with the requirements of Section 3 of this Article*, the boundary lines of districts shall be so drawn as to delineate an area containing *one or more whole counties.*
>
> (Emphasis added)

(Defendants' Ex. 12).

243. Article XI, Section 7 generally governs the establishment of *boundary* lines of house of representative districts. Article XI, Section 7(A) does not require the creation of "whole county districts". Instead, the creation of "whole county districts" is governed by Article XI, Sections 10(A) and 10(B). Article XI, Section 7(A) does not require that districts contain more than one whole county but merely requires that a district contain *"one or more* whole counties". (Deposition of James R. Tilling, Defendants' Ex. 96, TR. 140).

244. In the 1991 Apportionment Plan, there are fifty-six (56) whole counties contained within house districts in the 1991 Apportionment Plan. (Defendants' Ex. 22; Defendants' Ex. 96, TR. 142).

245. The 1991 Apportionment Plan fully complies with Article XI, Section 7(A). (Defendants' Ex. 96, TR. 142-144).

246. Article XI, Section 7(D) provides:

> (D) In making a new apportionment, district boundaries established by the preceding apportionment shall be *adopted to the extent* reasonably consistent with the requirements of Section 3 of this Article.
>
> (Emphasis added)

(Defendants' Ex. 12).

247. Given the major population shifts described above, relatively few of the districts established in the 1981 apportionment are even eligible to be considered for retention under Article XI, Section 7(D). (Deposition of James R. Tilling, Defendants' Ex. 6, TR. 144-145).

248. Robert Dykes, Plaintiffs' expert in *Quilter v. Voinovich*, agreed that the provisions of Article XI, Section 7(D) cannot be applied in a vacuum. The condition in Section 7(D) that previously established districts be retained "to the extent reasonably consistent with the requirements of Section 3 of this Article" must include consideration of the population not only within the district under review but also in the adjoining districts surrounding the district under review. (Deposition of Dykes, Defendants' Ex. 80, TR. 35, 38, 44). Accordingly, even though a particular district otherwise satisfies the population requirements of Article XI, Section 3, that district cannot be retained in the 1991 apportionment if population requirements in adjoining or surrounding districts under Article XI, Section 3 preclude retaining the districts under review. (Deposition of Dykes, Defendants' Ex. 80, TR. 35, 36).

249. Further, both Mr. Tilling and Mr. Dykes agreed that other sections of Article XI of the Ohio Constitution preclude retention of districts under Article XI, Section 7(D). Most particularly, the requirements of Article XI, Section 8 take precedence over the requirements of Article XI, Section 7(D). (Depositions of James R. Tilling, De-

fendants' Ex. 96, TR. 145; Deposition of Dykes, Defendants' Ex. 80, TR. 40).

250. The 1991 Apportionment Plan, retains House Districts 1, 3, 4, 5, 79, 82, 83 and 86 pursuant to Article XI, Section 7(D). (Defendants' Ex. 96, TR. 144).

251. In drafting the 1991 Apportionment Plan, Mr. Tilling could not retain House Districts 89, 90, 91, 94, 95 and 96 because of population requirements of Article XI, Section 3 in configuring adjacent districts and because of the requirements of Article XI, Section 8. (Defendants' Ex. 96, TR. 145).

252. The 1991 Apportionment Plan fully complies with the requirements of Article XI, Section 7(D). (Defendants' Ex. 96, TR. 142-145).

253. The population of House District 68 in the 1991 Apportionment Plan is 99,997 or 91.26% of the ideal population in a house district of 109,567. The population of Senate District 32, which includes House District 68, is also 10% less than the minimum population requirements of Article XI, Section 4. Specifically, the population of Senate District 32 is 93.99% of the ideal Senate population of 308,942 people and slightly less than the minimum requirements of that section (95% of the ideal Senate population). (Defendants' Ex. 96, TR. 146-151).

254. The Ohio Supreme Court in *Voinovich v. Ferguson* (1992), —— Ohio St. 3d —— held that the configuration of House District 68 and Senate District 32 complies with the Ohio Constitution and found "the plan to be Constitutional."

V. ALTERNATIVE PLANS CONSIDERED

A. 1991 Apportionment Plan As Technically Amended

255. At the February 18, 1992 Apportionment Board hearing, Mr. Tilling offered the 1991 Apportionment Plan, amended to correct technical errors. This plan will be

referred to as the "Amendment D to the 1991 Apportionment Plan". This plan corrects all technical errors in the 1991 Apportionment Plan. Otherwise, the plans are identical.

B. Alternative Plan

256. At the February 18, 1992 Apportionment Board hearing, Mr. Tilling offered an alternative plan for the Board's consideration, "Amendment E". This plan retains all basic elements of the 1991 Apportionment Plan ("Amendment D") except that minority districts were retained at approximately the same relative black population percentage, where possible, as existed in the 1981 plan with 1990 census figures. The following indicates the black populations for minority districts under this Amendment E.

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 7D PLAN, 1991 MAJORITY, AND 1991 MAJORITY AMENDMENT "D"

1981 Democrat Plan	7D Plan	1991 Majority Plan		1991 Majority Amendment "D"	
6-19 Cuyahoga	6-18 Cuyahoga [1]	8-20 Cuyahoga		8-20 Cuyahoga	
16—94.67% [1]	16—70.1%	10—63.42% [2]	67.35% [1]	10—63.42% [2]	67.35% [1]
14—90.05%	14—65.6%	12—65.13%	67.25%	12—65.13%	67.25%
12—74.80%	12—64.3%	8—61.41%	65.64%	8—61.41%	65.64%
15—34.80%	11—55.6%	9—58.36%	62.30%	9—58.36%	62.30%
*17—26.14%	17—26.0%	11—40.61%	43.01%	11—40.61%	43.01%
18—14.70%	15—19.1%	14— 6.86%	7.92%	14— 6.86%	7.92%
19—14.40%	18—11.1%	19— 3.71%	4.63%	19— 3.71%	4.63%
*13— 4.99%	13— 5.0%	15— 3.25%	3.29%	15— 3.25%	3.29%
11— 4.44%	9— 3.7%	17— 2.34%	2.85%	17— 2.34%	2.85%
9— 4.16%	7— 2.4%	13— 2.32%	2.75%	13— 2.32%	2.75%
* 7— 2.36%	8— 2.3%	18— 1.31%	1.41%	18— 1.31%	1.41%
8— 2.12%	10— .6%	16— 0.45%	0.47%	16— 0.45%	0.47%
*10— 0.64%	6— .5%	20— 0.23%	0.31%	20— 0.23%	0.31%
* 6— 0.49%					

[1] Black percentage of total population
[2] Black Voting Age Population
* Meets Population Requirements

28-35 Franklin	19-26 Franklin	21-29 Franklin		21-29 Franklin	
31—46.80%	21—46.2%	21—50.30%	55.92%	21—48.3%	54.3%
*29—38.50%	19—38.5%	22—44.13%	48.29%	22—40.98%	44.68%
*32—26.60%	22—26.6%	26— 8.07%	8.66%	26— 8.07%	8.66%
30—12.40%	20—11.2%	25— 7.96%	8.41%	25— 7.96%	8.41%
28— 5.90%	26— 6.2%	23— 7.78%	8.32%	23— 8.95%	9.79%
34— 5.10%	24— 4.8%	29— 4.47%	4.32%	29— 4.47%	4.32%
33— 4.10%	23— 4.3%	24— 3.92%	4.22%	24— 3.92%	4.22%
35— 1.40%	25— 2.3%	28— 3.56%	3.75%	28— 3.56%	3.75%
		27— 3.09%	3.57%	27— 3.09%	3.57%

20-27 Hamilton	27-34 Hamilton	30-37 Hamilton		30-37 Hamilton	
25—53.20%	28—60.9%	30—56.83%	61.07%	30—52.72%	55.98%
23—45.90%	33—47.1%	31—52.60%	59.82%	31—43.13%	49.16%
24—32.30%	34—26.4%	32—21.58%	24.00%	32—20.76%	24.41%
22—12.60%	31—13.7%	35— 7.91%	8.96%	35— 8.97%	10.14%
27—12.20%	32—12.6%	33— 7.50%	8.04%	33—11.84%	15.38%
20— 8.90%	27— 3.6%	36— 4.08%	4.49%	36— 4.08%	4.49%
21— 7.50%	30— 2.7%	37— 1.94%	2.14%	37— 1.94%	2.14%
26— 2.70%	29— 2.5%	34— 1.90%	2.14%	34— 1.90%	2.14%

1981 Democrat Plan	7D Plan	1991 Majority Plan		1991 Majority Plan Amendment "D"	
36-40 Montgomery	35-39 Montgomery	38-43 Montgomery		38-43 Montgomery	
36—42.10%	36—43.7%	38—50.70%	54.78%	38—40.1%	43.50%
*37—36.10%	37—40.0%	39—29.23%	32.35%	39—38.28%	41.69%
40— 6.20%	39— 4.7%	43— 3.61%	3.86%	43— 3.61%	3.86%
*39— 4.70%	35— 2.5%	40— 2.84%	3.30%	40— 2.84%	3.30%
38— 0.91%	38— .9%	42— 2.28%	2.76%	42— 2.28%	2.76%
		41— 1.18%	1.31%	41— 1.18%	1.31%
41-44 Summit	40-43 Summit	44-48 Summit		44-48 Summit	
*42—35.40%	42—35.2%	44—39.52%	43.26%	44—39.86%	43.07%
*44— 9.00%	40— 9.0%	45— 5.40%	6.29%	45— 5.40%	6.29%
*43— 2.90%	43— 2.9%	47— 5.00%	6.00%	47— 5.00%	6.00%
*41— 2.30%	41— 2.3%	46— 1.12%	1.33%	46— 1.12%	1.33%
		48— 0.61%	0.53%	48— 0.61%	0.53%
45-48 Lucas	44-47 Lucas	49-52 Lucas		49-52 Lucas	
*45—41.70%	45—41.70%	49—47.65%	50.92%	49—46.42%	49.9%
47—13.20%	47—12.3%	52— 4.85%	5.65%	52— 4.85%	5.65%
*46— 5.30%	46— 5.3%	50— 4.23%	5.46%	50— 4.23%	5.46%
48— 2.80%	44— 2.8%	51— 2.18%	2.40%	51— 2.18%	2.40%

49-51 Stark	54-57 Stark		54-57 Stark	
50—14.90%	54—12.93%	15.15%	54—12.93%	15.15%
49— 4.43%	55— 3.39%	3.84%	55— 3.39%	3.84%
51— 1.30%	57— 2.64%	2.98%	57— 2.64%	2.98%
	56— 1.15%	1.20%	56— 1.15%	1.20%
52-53 Mahoning	**64-65 Mahoning**		**64-65 Mahoning**	
53—27.80%	64—31.19%	35.53%	64—31.19%	35.53%
52—10.50%	65— 1.48%	1.64%	65— 1.48%	1.64%

Total (Minority Districts Over 10%)

24	16	16

Total (Minority-Majority (Over 50%))

4	8	9

C. Cuyahoga County Changes—Amendment F

257. Finally, at the February 18, 1992 Apportionment Board hearing, Mr. Tilling offered an alternative (Amendment "F") to the 1991 Apportionment Plan reflecting changes in the minority districts in Cuyahoga County. This plan creates five (5) majority-minority districts in Cuyahoga County as follows:

	Black VAP	Black Population
H.D. 8	61.7%	66.0%
H.D. 9	58.4%	62.3%
H.D. 10	59.5%	63.3%
H.D. 11	54.2%	56.8%
H.D. 12	53.7%	57.6%

D. Democrats' "7(D)" Plan As Revised

258. Messrs. Ferguson and Quilter have submitted an alternative plan referred to as the "7(D)" plan.

259. The 7(D) Plan retains the relative black populations reflected in the 1981 plan with 1990 census populations. A comparison of the relative black populations in the 1981 plan, the "7(D)" plan and the 1991 Mapority Plan (the 1991 Apportionment Plan) follows:

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRATIC PLAN, 7D PLAN AND 1991 MAJORITY APPORTIONMENT PLAN

	1981 Democrat Plan	7D Plan		1991 Majority Plan	
	6-19 Cuyahoga	6-18 Cuyahoga [1]		8-20 Cuyahoga	
(Whalen)	16—94.67% [1]	16—68.9% [2]	70.1%	10—63.42% [2]	67.35% [1]
(Prentiss)	14—90.05%	14—61.2%	65.6%	12—65.13%	67.25%
(James)	12—74.80%	12—60.6%	64.3%	8—61.41%	65.64%
	15—34.80%	11—53.6%	55.6%	9—58.36%	62.30%
	*17—26.14%	17—24.4%	26.0%	11—40.61%	43.01%
	18—14.70%	15—18.0%	19.1%	14— 6.86%	7.92%
	19—14.40%	18—10.1%	11.1%	19— 3.71%	4.63%
	*13— 4.99%	13— 4.4%	5.0%	15— 3.25%	3.29%
	11— 4.44%	9— 3.1%	3.7%	17— 2.34%	2.85%
	9— 4.16%	7— 2.0%	2.4%	13— 2.32%	2.75%
	* 7— 2.36%	8— 2.0%	2.3%	18— 1.31%	1.41%
	8— 2.12%	10— .5%	.6%	16— 0.45%	0.47%
	*10— 0.64%	6— .5%	.5%	20— 0.23%	0.31%
	* 6— 0.49%				

[1] Black percentage of total population

[2] Black Voting Age Population

* Meets Population Requirements

	1981 Democrat Plan	7D Plan		1991 Majority	
	28-35 Franklin	19-26 Franklin		21-29 Franklin	
(Beatty)	31—46.80%	21—41.6%	46.2%	21—50.30%	55.92%
(Miller)	*29—38.50%	19—34.8%	38.5%	22—44.31%	48.29%
	*32—26.60%	22—25.1%	26.6%	26— 8.07%	8.66%
	30—12.40%	20— 9.9%	11.2%	25— 7.96%	8.41%
	28— 5.90%	26— 5.5%	6.2%	23— 7.78%	8.32%
	34— 5.10%	24— 4.5%	4.8%	29— 4.47%	4.32%
	33— 4.10%	23— 3.6%	4.3%	24— 3.92%	4.22%
	35— 1.40%	25— 2.2%	2.3%	28— 3.56%	3.75%
				27— 3.09%	3.57%
	20-27 Hamilton	27-34 Hamilton		30-37 Hamilton	
(Rankin)	25—53.20%	28—57.6%	60.9%	30—56.83%	61.07%
(Mallory)	23—45.90%	33—40.7%	47.1%	31—52.60%	59.82%
	24—32.30%	34—22.9%	26.4%	32—21.58%	24.00%
	22—12.60%	31—10.5%	13.7%	35— 7.91%	8.96%
	27—12.20%	32—11.2%	12.6%	33— 7.50%	8.04%
	20— 8.90%	27— 3.2%	3.6%	36— 4.08%	4.49%
	21— 7.50%	30— 2.3%	2.7%	37— 1.94%	2.14%
	26— 2.70%	29— 2.3%	2.5%	34— 1.90%	2.14%

	36-40 Montgomery	35-39 Montgomery		38-43 Montgomery	
(McLin)	36—42.10%	36—41.2%	43.7%	38—50.70%	54.78%
(Roberts)	*37—36.10%	37—36.0%	40.4%	39—29.23%	32.35%
	40— 6.20%	39— 3.6%	4.7%	43— 3.61%	3.86%
	*39— 4.70%	35— 2.0%	2.5%	40— 2.84%	3.30%
	38— 0.91%	38— .8%	.9%	42— 2.28%	2.76%
				41— 1.18%	1.31%
	41-44 Summit	40-43 Summit		44-48 Summit	
(Sykes)	*42—35.40%	42—31.7%	35.2%	44—39.52%	43.26%
	*44— 9.00%	40— 8.1%	9.0%	45— 5.40%	6.29%
	*43— 2.90%	43— 2.5%	2.9%	47— 5.00%	6.00%
	*41— 2.30%	41— 2.0%	2.3%	46— 1.12%	1.33%
				48— 0.61%	0.53%
	45-48 Lucas	44-47 Lucas		49-52 Lucas	
(Jones)	*45—41.70%	45—37.4%	41.70%	49—47.65%	50.92%
	47—13.20%	47—10.4%	12.3%	52— 4.85%	5.65%
	*46— 5.30%	46— 4.4%	5.3%	50— 4.23%	5.46%
	48— 2.80%	44— 2.6%	2.8%	51— 2.18%	2.40%

1981 Democrat Plan	7D Plan		1991 Majority Plan	
49-51 Stark	49-51 Stark		54-57 Stark	
50—14.90%	50—12.4%	14.4%	54—12.93%	15.15%
49— 4.43%	51— 5.1%	5.5%	55— 3.39%	3.84%
51— 1.30%	49— 3.4%	3.8%	57— 2.64%	2.98%
			56— 1.15%	1.20%
52-53 Mahoning			64-65 Mahoning	
53—27.80%			64—31.19%	35.53%
52—10.50%			65— 1.48%	1.64%
Total (Minority—Majorilty (Over 50%))				
4	5	9		

260. As can be seen, the "7(D)" plan reflects only five (5) majority-minority districts, compared to four (4) in the 1981 plan and eight (8) in the 1991 Apportionment Plan. The 7(D) plan fragments minority voters in various counties. In Franklin County, H.D. 21 contains only 41.6% Black VAP and H.D. 19 contains only 34.8% Black VAP. In Hamilton County, the plan increases Black VAP in the district (prior H.D. 25, Representative Rankin's District) while H.D. 33 has a Black VAP of only 40.7%. In Montgomery County, H.D. 36 has a Black VAP of only 41.2%, compared to 50.70% in the 1991 Apportionment Plan. In Summit County, H.D. 42 has a Black VAP of only 31.7%, seriously threatening the ability to elect a candidate of choice in H.D. 42 (Sykes district).

261. Mr. Dykes testified at the February 18, 1992 hearing that he was not an expert in the Voting Rights Act and, more importantly, conducted no analysis of totality of circumstances. There was no rationale given and no evidence offered to justify the relative black populations in any minority districts. There was no evidence submitted that minorities voting influence would not be diluted under this plan.

262. Further, the "7(D)" plan splits Trumbull County in an impermissible fashion under the Ohio Constitution and violates the provisions of Article XI, Section 10(c).

CONCLUSIONS

I. VOTING RIGHTS ACT/FIFTEENTH AMENDMENT

1. The evidence establishes that the 1991 Apportionment Plan was fully endorsed by the Ohio Conference of Branches of the NAACP and was endorsed by Cuyahoga County by BEDO, BEDCO, Dr. Brisker. Plaintiffs' own minority consultant, and Congressman Stokes of the 21st Congressional Caucus. Minority districts created under the 1991 Apportionment Plan were created as the result

of extensive discussions with BEDO representatives, with extensive input from minority interest groups and representatives collected during fifteen (15) public hearings throughout the State, and with the direct input and endorsement of the NAACP. The record is replete with testimony regarding the good faith efforts of James R. Tilling to gain the maximum input possible from the minority community in adopting the 1991 Apportionment Plan.

2. The evidence establishes that the vast majority of districts in major urban areas in Ohio had to be reconfigurated solely because population changes within the districts caused the population of the existing districts to fail to comply with the requirements of Article XI, Section 3 of the Ohio Constitution. As indicated in Defendants' Exhibit 58, nine (9) out of fourteen (14) districts in Cuyahoga County, seven (7) out of eight (8) districts in Hamilton County, six (6) out of eight (8) districts in Franklin County, three (3) out of five (5) districts in Montgomery County and two (2) out of four (4) districts in Lucas County had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution.

3. The evidence indicates that districts in all major urban areas were reconfigured in the 1991 Apportionment Plan due to the population requirements of Article XI, Section 3 of the Ohio Constitution and in such a way as to avoid minority vote dilution. The 1991 Apportionment Plan reflects eight (8) minority-majority districts, twice the number in the 1981 plan.

4. There is no relative reduction in the number of districts over 10% black voting age population. In the 1991 Apportionment Plan, there are twenty (20) such districts, precisely the same number as in the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter (and the BEDO plan).

5. There is no dilution of minority voting strength in the districts currently represented by minority incum-

bents. All eleven (11) house districts remain strongly Democratic districts.

6. Consideration of the "totality of circumstances" factors further support the reasonableness of the minority districts created in the 1991 Apportionment Plan.

a) There is a history of official discrimination in the state and political subdivisions at issue that touched the rights of minorities to fairly participate in the democratic process;

b) There exists significant racial bloc voting throughout Ohio;

c) Barriers exist to prevent minorities from fully participating in Democratic primaries in Ohio. These barriers include campaign financing, party support and the screening process;

d) The effects of discrimination continue to exist in housing, in education, and in employment;

e) Political campaigns in Ohio have been characterized by overt or subtle racial appeal; and

f) While minorities have been elected to house seats in Ohio, no black has ever been elected to statewide office and new black candidates face barriers to election. The minority incumbents elected have been elected from predominately minority districts or have advantages of incumbency or family name recognition. In Ohio, no minority is currently elected from a district with less than 35% black population.

7. Minority populations in all major urban counties are geographically compact, contiguous and politically cohesive and do not reflect unreasonable gerrymandering.

8. The districts created in the 1991 Apportionment Plan, except for House District 68 and Senate District 32, meet the population requirements of Article XI, Sections 3 and 4 of the Ohio Constitution. All districts meet accept-

able population requirements under the Ohio Constitution and federal law. See *Voinovich v. Ferguson* (1992), —— Ohio St. 3d ——.

9. It is unreasonable to reconfigure minority districts based on the electoral success of minority incumbents. Further, such reconfiguration will result in impermissible minority vote dilution. Consideration of factors such as racial bloc voting, voter turnout, population shifts, demographics, incumbency factors, voting patterns and other such factors require that minority districts outside Cuyahoga County must reflect increased relative percentages of black voting age population.

III. EQUAL PROTECTION/FOURTEENTH AMENDMENT

10. The evidence establishes that the 1991 Apportionment Plan reflects no partisan bias. The 1991 Apportionment Plan and the 1991 Minority Plan proposed by Plaintiffs Ferguson and Quilter reflect a difference of only (4) seats statewide. The seats/vote curve analysis performed by Defendants' expert, Dr. Gary King, establishes that there is no statistically significant partisan bias in the 1991 Apportionment Plan either in the Ohio House or the Ohio Senate.

IV. OHIO CONSTITUTIONAL ISSUES

11. The 1991 Apportionment Plan, as amended, is in compliance with Article XI of the Ohio Constitution. *Voinovich v. Ferguson* (1992), —— Ohio St. 3d ——.

V. ALTERNATIVE PLANS

12. The 1991 Apportionment Plan as amended (Amendment D), as does the 1991 Apportionment Plan, complies in all respects with applicable state and federal law and results in no minority vote dilution based on the totality of circumstances.

13. Amendment E to the 1991 Apportionment, which retains relative black populations similar to the 1981

plan, reflects a risk of minority vote dilution based on an analysis of totality of circumstances.

14. Amendment F reflects five (5) majority-minority districts in Cuyahoga County, with Black VAP's from 61.7% to 53.7%. This plan was originally introduced by the NAACP and endorsed by the majority members of the Board.

15. The "7(D)" plan proposed by Messrs. Ferguson and Quilter was not supported by any evidence relating to totality of circumstances and, therefore, is not responsive to the mandate of the *Quilter* Court. There was no evidence to justify the relative black populations in any minority district. There was no evidence submitted that minority voting influence would not be diluted under the plan. The plan further violates the Ohio Constitution as provided above.

The above Findings and Conclusions are hereby adopted by the persons responsible for apportionment pursuant to Article XI of the Ohio Constitution.

Dated: February 18, 1992

/s/ George Voinovich
GEORGE VOINOVICH
Governor of the State of Ohio

/s/ Robert Taft, II
ROBERT TAFT, II
Secretary of State of Ohio

/s/ Stanley J. Aronoff
STANLEY J. ARONOFF
President of the Ohio Senate

THOMAS FERGUSON
Auditor of the State of Ohio

BARNEY QUILTER
House Representative

APPENDIX I

CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or

given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

AMENDMENT XV [1870], UNITED STATES CONSTITUTION

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

28 U.S.C. § 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 2284. Three-judge court; when required; composition; procedure

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an

action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any state-wide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any ac-

tion of a single judge may be reviewed by the full court at any time before final judgment.

42 U.S.C. § 1973

SEC. 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973c

SEC. 5. Whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the first sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a)

based upon determinations made under the second sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 4(a) based upon determinations made under the third sentence of section 4(b) are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, in contravention of the guarantees set forth in section 4(f)(2), and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such quali-

fication, prerequisite, standard, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to re-examine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court.

OHIO CONSTITUTION ARTICLE XI: APPORTIONMENT

§ 1 [Persons responsible for apportionment of state for members of general assembly.]

The governor, auditor of state, secretary of state, one person chosen by the speaker of the house of representatives and the leader in the senate of the political party of which the speaker is a member, and one person chosen by the legislative leaders in the two houses of the major political party of which the speaker is not a member shall be the persons responsible for the apportionment of this state for members of the general assembly.

Such persons, or a majority of their number, shall meet and establish in the manner prescribed in this Article the boundaries for each of ninety-nine house of representative districts and thirty-three senate districts. Such meeting shall convene on a date designated by the governor between August 1 and October 1 in the year one thousand nine hundred seventy-one and every tenth year thereafter. The governor shall give such persons two weeks advance notice of the date, time, and place of such meeting.

The governor shall cause the apportionment to be published no later than October 5 of the year in which it is

made, in such manner as provided by law. (Enacted Nov. 7, 1967. Former § 1 repealed, see SJR 24, 107th General Assembly.)

§ 2 [Method of apportionment of state for members of general assembly.]

The apportionment of this state for members of the general assembly shall be made in the following manner: The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment. The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment. (Enacted Nov. 7, 1967. Former § 2 repealed, see SJR 24, 107th General Assembly.)

§ 3 [Population of each house of representatives district.]

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article. (Enacted Nov. 7, 1967. Former § 3 repealed, see SJR 24, 107th General Assembly.)

§ 4 [Population of each senate district.]

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five percent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article. (As enacted Nov. 7, 1967. Former § 4 repealed, see SJR 24, 107th General Assembly).

§ 5 [Representation.]

Each house of representatives district shall be entitled to a single representative in each General Assembly. Every senate district shall be entitled to a single senator in each General Assembly. (As enacted Nov. 7, 1967. Former § 5 repealed, see SJR 24, 107th General Assembly.)

§ 6 [Creation of district boundaries; change at end of decennial period.]

District boundaries established pursuant to this Article shall not be changed until the ensuing federal decennial census and the ensuing apportionment or as provided in section 13 of this Article, notwithstanding the fact that boundaries of political subdivisions or city wards within the district may be changed during that time. District boundaries shall be created by using the boundaries of political subdivisions and city wards as they exist at the time of the federal decennial census on which the apportionment is based, or such other basis as the general assembly has directed. (As enacted Nov. 7, 1967. Former § 6 repealed, see SJR 24, 107th General Assembly.)

§ 7 [Boundary lines of house of representatives districts.]

(A) Every house of representatives district shall be compact and composed of contiguous territory, and the

boundary of each district shall be a single non-intersecting continuous line. To the extent consistent with the requirements of section 3 of this Article, the boundary lines of districts shall be so drawn as to delineate an area containing one or more whole counties.

(B) Where the requirements of section 3 of this Article cannot feasibly be attained by forming a district from a whole county or counties, such district shall be formed by combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards.

(C) Where the requirements of section 3 of this Article cannot feasibly be attained by combining the areas of governmental units as prescribed in division (B) of this section, only one such unit may be divided between two districts, giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named.

(D) In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article. (As enacted Nov. 7, 1967. Former § 7 repealed, see SJR 24, 107th General Assembly.)

§ 8 [Determination of number of house of representatives districts within each county.]

A county having at least one house of representatives ratio of representation shall have as many house of representatives districts wholly within the boundaries of the county as it has whole ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining house of representatives district.

The number of whole ratios of representation for a county shall be determined by dividing the population of

the county by the ratio of representation for the house of representatives determined under section 2 of this Article. (As enacted Nov. 7, 1967. Former § 8 repealed, see SJR 24, 107th General Assembly.)

§ 9 [When population of county is fraction of ratio of representation.]

In those instances where the population of a county is not less than ninety per cent nor more than one hundred ten per cent of the ratio of representation in the house of representatives, reasonable effort shall be made to create a house of representatives district consisting of the whole county. (As enacted Nov. 7, 1967. Former § 9 repealed, see SJR 24, 107th General Assembly.)

§ 10 [Creation and numbering of house of representative districts.]

The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representatives districts, which shall be created and numbered in the following order to the extent that such order is consistent with the foregoing standards:

(A) Each county containing population substantially equal to one ratio of representation in the house of representatives, as provided in section 2 of this Article, but in no event less than ninety-five per cent of the ratio nor more than one hundred five per cent of the ratio shall be designated a representative district.

(B) Each county containing population between ninety and ninety-five per cent of the ratio or between one hundred five and one hundred ten per cent of the ratio may be designated a representative district.

(C) Proceeding in succession from the largest to the smallest, each remaining county containing more than one whole ratio of representation shall be divided into house of representatives districts. Any remaining terri-

tory within such county containing a fraction of one whole ratio of representation shall be included in one representative district by combining it with adjoining territory outside the county.

(D) The remaining territory of the state shall be combined into representative districts. (As enacted Nov. 7, 1967. Former § 10 repealed, see SJR 24, 107th General Assembly.)

§ 11 [Senate districts.]

Senate districts shall be composed of three contiguous house of representatives districts. A county having at least one whole senate ratio of representation shall have as many senate districts wholly within the boundaries of the county as it has whole senate ratios of representation. Any fraction of the population in excess of a whole ratio shall be a part of only one adjoining senate district. Counties having less than one senate ratio of representation, but at least one house of representatives ratio of representation shall be part of only one senate district.

The number of whole ratios of representation for a county shall be determined by dividing the population of the county by the ratio of representation in the senate determined under section 2 of this Article.

Senate districts shall be numbered from one through thirty-three and as provided in section 12 of this Article. (As enacted Nov. 7, 1967. Former § 11 repealed, see SJR 24, 107th General Assembly.)

§ 12 [Change in boundaries of senate districts.]

At any time the boundaries of senate districts are changed in any plan of apportionment made pursuant to any provision of this Article, a senator whose term will not expire within two years of the time the plan of apportionment is made shall represent, for the remainder of the term for which he was elected, the senate district

which contains the largest portion of the population of the district from which he was elected, and the district shall be given the number of the district from which the senator was elected. If more than one senator whose term will not so expire would represent the same district by following the provisions of this section, the persons responsible for apportionment, by a majority of their number, shall designate which senator shall represent the district and shall designate which district the other senator or senators shall represent for the balance of their term or terms. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 12 repealed May 7, 1968, HJR 42.)

§ 13 [Jurisdiction of supreme court, effect of determination of unconstitutionality; apportionment.]

The supreme court of Ohio shall have exclusive, original jurisdiction in all cases arising under this Article. In the event that any action of this Constitution relating to apportionment or any plan of apportionment made by the persons responsible for apportionment, by a majority of their number, is determined to be invalid by either the supreme court of Ohio, or the supreme court of the United States, then notwithstanding any other provisions of this Constitution, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment in conformity with such provisions of this Constitution as are then valid, including establishing terms of office and election of members of the general assembly from districts designated in the plan, to be used until the next regular apportionment in conformity with such provisions of this Constitution as are then valid.

Notwithstanding any provision of this Constitution or any law regarding the residence of senators and representatives, a plan of apportionment made pursuant to this section shall allow thirty days for persons to change residence in order to be eligible for election.

The governor shall give the persons responsible for apportionment two weeks advance written notice of the date, time, and place of any meeting held pursuant to this section. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly. Former § 13 repealed May 7, 1968, HJR 42.)

§ 14 [District boundaries until January 1, 1973.]

The boundaries of house of representatives districts and senate districts from which representatives and senators were elected to the 107th general assembly shall be the boundaries of house of representatives and senate districts until January 1, 1973, and representatives and senators elected in the general election in 1966 shall hold office for the terms to which they were elected. In the event all or any part of this apportionment plan is held invalid prior to the general election in the year 1970, the persons responsible for apportionment by a majority of their number shall ascertain and determine a plan of apportionment to be effective until January 1, 1973, in accordance with section 13 of this Article. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

§ 15 [Severability provision.]

The various provisions of this Article XI are intended to be severable, and the invalidity of one or more of such provisions shall not affect the validity of the remaining provisions. (As enacted Nov. 7, 1967, see SJR 24, 107th General Assembly.)

APPENDIX J

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL

C8-91-985

PATRICIA COTLOW, PHILLIP KRASS, SHARON LACOMB, JAMES STEIN, and THEODORE SUSS, individually and on behalf of all Citizens of Minnesota similarly situated,

Plaintiffs,

and

JOHN WALKER, HOWARD MILLER, DON SUDOR, and NKAJLO VANGH,

Plaintiff-Intervenors,

vs.

JOAN GROWE, Secretary of State of Minnesota; and PATRICK H. O'CONNOR, Hennepin County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants,

and

THE SEVENTY-SEVENTH MINNESOTA STATE HOUSE OF REPRESENTATIVES and the SEVENTY-SEVENTH MINNESOTA STATE SENATE,

Defendant-Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER FOR JUDGMENT ON LEGISLATIVE REDISTRICTING

[Filed Nov. 21, 1991]

The Special Redistricting Panel convened hearings on July 26, August 29, September 24, October 16, and November 14, 1991.

Plaintiffs were represented by Alan W. Weinblatt, Weinblatt & Davis; plaintiff-intervenors were represented by Bruce D. Willis, Popham, Haik, Schnobrich & Kaufman, Ltd.; defendant Joan Growe, Secretary of State, was represented by John R. Tunheim, Chief Deputy Attorney General, and Jocelyn Olson, Assistant Attorney General; defendant Patrick H. O'Connor, Hennepin County Auditor, was represented by Michael O. Freeman, Hennepin County Attorney, and Toni A. Beitz, Senior Assistant Hennepin County Attorney; and defendant-intervenors were represented by John D. French and Michael L. Cheever, Faegre & Benson, and Peter S. Wattson, Senate Counsel.

All parties were directed to file legislative redistricting plans on October 7, 1991. The panel convened hearings on October 16 and November 14, 1991 for comments on the plans.

Based on the record received from the Minnesota District Court, Fourth Judicial District; the record compiled during the course of the hearings; and the submissions of the parties; the panel makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In January 1991, Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss initiated this action in Minnesota District Court, Fourth Judicial District. They asked the court to declare the present

legislative apportionment, Minn. Stat. §§ 2.019, 2.042 through 2.702 (1990), and the present congressional apportionment, outlined in *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982), invalid under the Minnesota and United States Constitutions.

2. The plaintiffs further requested the court to retain jurisdiction during the 1991 session of the legislature to determine whether any legislatively enacted plans for redistricting satisfied the Minnesota and United States Constitutions and the Federal Voting Rights Act. In the absence of the enactment of a constitutionally valid method of apporitonment by the legislature, the plaintiffs asked this court to make a determination of a proper legislative and congressional apportionment system for the State of Minnesota.

3. On February 15, 1991, John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh served notice and statement of intervention. On March 14, 1991, plaintiffs served notice of objection to the intervention.

4. On February 25, 1991, the previously named plaintiffs and defendants Joan Growe and the Hennepin County Auditor stipulated that the court had subject matter jurisdiction; that as a result of population changes reflected in the 1990 federal census, the present legislative and congressional districts contravene the Minnesota and United States Constitutions; and authorized the Chief Judge of the Hennepin County District Court to request the Chief Justice of the State of Minnesota to appoint a panel of three district court or appellate judges to hear and decide this action.

5. On April 2, 1991, the Minnesota House of Representatives and the Minnesota Senate served notice of intervention as defendants and a statement of intervention. No party objected.

6. On May 18, 1991, the legislature passed Chapter 246, S.F. No. 1571, establishing a legislative redistricting

plan. The bill was presented to the governor on May 24, 1991.

7. On June 4, 1991, the Minnesota Supreme Court appointed the undersigned three-judge panel to hear and decide all matters, including all pretrial and trial motions, and to reach an ultimate disposition of this case.

8. On June 20, 1991, the Minnesota Supreme Court declined original jurisdiction on the question of the validity of the enactment of a number of bills, including Chapter 246, the legislative redistricting bill. A declaratory judgment action was filed in Ramsey County District Court.

9. On July 26, 1991, the special redistricting panel conducted a pretrial status conference and, on July 29, 1991, issued Pretrial Order No. 1 ordering (a) that John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh be permitted to intervene as plaintiff-intervenors; (b) that parties submit responses to the criteria adopted by the Minnesota Legislature for legislative and congressional redistricting plans; and (c) that arrangements be made to permit the panel to view the legislature's redistricting computer system.

10. On August 2, 1991, by order of Ramsey County District Court, Chapter 246 was declared to be a validly enacted law.

11. On August 16, 1991, the special redistricting panel issued Pretrial Order No. 2 establishing certain preliminary criteria for legislative and congressional redistricting and directing oral argument on other reserved criteria.

12. After the parties' arguments on the reserved criteria, the panel issued Pretrial Order No. 3 on September 13, 1991, adopting the final criteria for congressional and legislative redistricting. The criteria for legislative redistricting are as follows:

1. The Senate must be composed of 67 members. The House of Representatives must be composed of 134 members.

2. Each district is entitled to elect a single member.

3. A representative district may not be divided in the formation of a Senate district.

4. The districts must be substantially equal in population. The population of a district must not deviate from the ideal by more than two percent. Because a court-ordered reapportionment plan must conform to a higher standard of population equality than a legislative reapportionment plan, *de minimis* deviation from the population norm will be the goal for establishing districts. *See Chapman*, 420 U.S. 1, 95 S. Ct. 751; *Connor*, 431 U.S. 407, 97 S. Ct. 1828.

5. The districts must be composed of convenient contiguous territory structured into compact units. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.

6. The districts must be numbered in a regular series, beginning with House district 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then in Minneapolis and St. Paul.

7. The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a racial or language minority makes it possible, the districts must increase the probability that members of the minority will be elected. Any plan adopted by the court shall comply with the applicable provisions of the Federal Voting Rights Act, 42 U.S.C. § 1971, *et seq.*

8. The districts will be drawn with attention to county, city and township boundaries. A county, city, or township will not be divided into more than one district except as necessary to meet equal population requirements or to form districts that are composed of convenient, contiguous and compact territory. When any county, city or township must be divided into one or more districts, it will be divided into as few districts as practicable. *Reynolds v. Sims*, 377 U.S. 533, 578-79, 84 S. Ct. 1362, 1390-91 (1964); *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572 (1967).

9. The districts should attempt to preserve communities of interest when that can be done in compliance with the preceding standards. The panel may recognize a community's character as urban, suburban or rural. *See Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971); *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982); *LaComb v. Growe*, 541 F. Supp. 160 (D. Minn. 1982); *Maryland Citizens Comm. for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966), *aff'd sub. nom. Alton v. Tawes*, 384 U.S. 315, 86 S. Ct. 1590 (1966). Additional communities of interest shall be considered if persuasively established and not in violation of applicable case law.

10. Past voting behavior and residency of incumbents shall not be used as criteria; however, they may be used to evaluate the fairness of plans submitted to the court.

13. Subsequently, the panel adopted an additional criterion that all submitted plans should be based on Chapter 246. Defendant-intervenors, joined by other parties, urged the panel to adopt, as a criterion, certain "curative amendments" to Chapter 246. The amendments had passed out of the special redistricting committees of both houses on August 26, 1991, after the legislature had adjourned.

However, the amendments had not been passed by the full bodies of either house, nor had they been presented to the governor for his signature. The panel declined to adopt as a criterion the legislative committees' proposed corrections to Chapter 246.

14. The August 29, 1991 Pretrial Order No. 3 also ordered suspension, until further order of the panel, of the time periods within which local units of government are required to complete the redefining of the boundaries of election precincts, wards, or other local election districts pursuant to Minn. Stat. Ann. §§ 204B.135, 204B.14, 205.84, 205A.12, and 375.02 (West Supp. 1991). The pretrial order designated the format for submission of redistricting plans and directed oral argument on various motions, including whether Chapter 246 violates the Minnesota or United States Constitutions or the Federal Voting Rights Act. Finally, recognizing that the time requirements for congressional redistricting are less stringent, the panel deferred submission of congressional redistricting plans.

15. Following submissions from the parties, the panel issued Pretrial Order No. 4, on October 1, 1991, which (a) denied plaintiff-intervenors' motion to stay this proceeding; (b) declared that the numerous facial infirmities in Chapter 246, including noncontiguous districts, violate Article IV, sections 2 and 3 of the Minnesota Constitution; and (c) declared that facial infirmities also violate the equality of representation requirement of the fourteenth amendment to the United States Constitution. The panel denied plaintiff's motion to enforce Chapter 246, together with its "curative amendments", as the reapportionment plan for the State of Minnesota. Because no party submitted specific allegations of Voting Rights Act violations, the panel ordered submission of any Chapter 246 violations of the Federal Voting Rights Act without waiver of jurisdictional objections by October 7, 1991.

16. On October 7, 1991, defendant-intervenors the Minnesota Legislature renewed its submission of Chapter 246 together with the curative amendments adopted by the Senate and House Committees on Redistricting; plaintiffs proposed adoption of the legislature's plan, with curative amendments, as the court-ordered legislative redistricting plan; defendant Secretary of State Growe supported the submission of the legislature; defendant Hennepin County Auditor supported the submission of the legislature; plaintiff-intervenors submitted a proposed legislative redistricting plan. The panel received additional submissions, not part of the record, from citizens groups and individual legislators.

17. No violations of the Federal Voting Rights Act were asserted.

18. On October 15, 1991, defendant-intervenors the Minnesota Legislature submitted a written response to the plaintiff-intervenors' proposed legislative redistricting plan. On October 16 (a) defendant Growe submitted a written response to plaintiff-intervenors' proposed legislative redistricting plan; (b) plaintiff-intervenors submitted a written response to the legislature's redistricting plan; and (c) defendant Hennepin County Auditor submitted a written analysis of the plaintiff-intervenors' plan. On October 17 and 18, 1991, defendant-intervenor the Minnesota Legislature submitted additional responses to the plaintiff-intervenors' redistricting plan.

19. On November 4, 1991, defendant-intervenor the Minnesota Legislature submitted a congressional redistricting plan. The plan is based on S.F. No. 1597/H.F. No. 1728, adopted by the House of Representatives Committee on Redistricting and the Senate Committee on Redistricting on October 30, and 31, 1991, and referred to the full House and Senate for consideration in early January, 1992.

20. On November 8, 1991, the panel issued Pretrial Order No. 5 ordering final oral argument on (a) the existence and use of any legislative history of Chapter 246, including maps, and (b) the application of the rules of statutory interpretation to avoid, modify, or correct constitutional or other defects in Chapter 246. In addition, the panel ordered that all parties have computer access to each proposed plan file and written geographic description of both plans.

21. On November 14, 1991, defendant-intervenors the Minnesota Legislature submitted a memorandum on Chapter 246's legislative history, appending affidavits of State Representative Peter Rodosovich, State Senator Lawrence J. Pogemiller, and Craig Lindeke from the Revisor of Statutes Office. The panel has adopted the following as relevant pieces of legislative history:

a. A set of two small black and white maps, one of the state and one of the metropolitan area. These maps were distributed to each member of the House in the House chamber on May 18, 1991, before the members voted on Chapter 246. These two maps were also distributed to each member of the Senate in the Senate chambers on May 16, 1991, before the members voted on Chapter 246. In each instance, the chief authors of the bill represented that the proposed redistricting plan was depicted in the two black and white maps.

b. A second map group consisting of four large color maps depicting respectively the areas of (1) the State of Minnesota, (2) the seven-county metropolitan area, (3) the City of Minneapolis, and (4) the City of St. Paul. The maps were used in both the House and Senate commitees and displayed in the House retiring room on May 17, 1991, the House chamber on May 18, 1991, the Senate retiring room on May 16, 1991, and in the Senate chamber on May 16, 1991.

c. A group of seven reports, primarily population tables. Three of the reports were distributed to members of the House on May 18, 1991, before they voted on Chapter 246. Three of the reports were distributed to all members of the Senate on May 18, 1991, before they voted on Chapter 246. The remaining report was distributed to the members of the Senate Redistricting Committee on May 3, 1991.

CONCLUSIONS OF LAW

1. Minnesota Laws 1991, Chapter 246, violates Article IV, sections 2 and 3 of the Minnesota Constitution because, among other defects, it creates noncontiguous districts.

2. Minnesota Laws 1991, Chapter 246 violates the equality of representation requirement of the fourteenth amendment of the United States Constitution.

3. Unless a legislative plan is incorrectably invalid, a court may not simply substitute its own reapportionment preferences for those of the state legislature. *See Upham v. Seamon*, 456 U.S. 37, 40-42, 102 S. Ct. 1518, 1520-21 (1982). Courts are not permitted to disregard state apportionment policy or plans without solid constitutionol grounds for doing so. *White v. Weiser*, 412 U.S. 783, 795, 93 S. Ct. 2348, 2355 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160, 91 S. Ct. 1858, 1878 1971)). The court must reconcile constitutional requirements with the goals of state political policy by limiting its modifications "to those necessary to cure any constitutional or statutory defect." *Upham* 456 at 43, 102 S. Ct. at 1522; *see also Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082 (N.D. Ill. 1982) (making only those corrections necessary to remove unconstitutional defects). Such deference does not extend to the curative amendments, as they have not been adopted into law.

4. Most of the constitutional and statutory defects in Minnesota Laws 1991, Chapter 246 can be cured by ascertaining and effectuating the legislative intent *see* Minn. Stat. § 645.16 (1990); and by applying canons of statutory construction, Minn. Stat. §§ 645.16 through 645.43 (1990). The remaining defects require corrections and adjustments which are based on legislative policy and the adopted legislative redistricting criteria. These corrections and adjustments are made in the attached plan and explained in the annotations that will accompany the final redistricting order.

5. Minnesota Laws 1991, Chapter 246 contains no Federal Voting Rights Act violation.

BASED ON THE ENTIRE RECORD,
IT IS HEREBY ORDERED:

1. That the following reapportionment of the Minnesota Legislature, subject to amendments after the final December 3, 1991 hearing, shall be effective for the 1992 primary and general elections unless a constitutional plan is enacted by the State of Minnesota before January 21, 1992.

2. Elections conducted after January 1, 1993 shall be according to this plan or any constitutional plan adopted after this date by the State of Minnesota.

3. Submission of plans for congressional redistricting is deferred until further order of this court.

4. Subject to reconsideration following December 3 oral arguments, the stay of time periods for completion of redistricting for local units of government is dissolved on the date of the final order.

5. The panel retains jurisdiction over this matter to ensure that any bill enacted into law complies with the

Minnesota and United States Constitutions and the Federal Voting Rights Act.

Dated: November 21, 1991

BY THE COURT:

/s/ Harriet Lansing
HONORABLE HARRIET LANSING

/s/ Kenneth J. Maas
HONORABLE KENNETH J. MAAS

/s/ William E. Walker
HONORABLE WILLIAM E. WALKER

Memorandum

The Minnesota Constitution places the power and responsibility of redistricting with the legislature and the governor. Minn. Const., art. IV, §§ 3, 24. In the last 78 years, however, Minnesota's redistricting rule has become its exception. Only once during this time have the legislature and the governor been able to pass a redistricting plan. Consequently, the redistricting courts have been compelled to assume a more legislative role to adjust for the detrimental lack of a "current expression of the state's political preferences regarding the complicated redistricting process." *LaComb v. Growe*, 541 F. Supp. 145, 150-51 (D. Minn. 1982).

Following the 1990 federal census, the 1991 Minnesota House and Senate were able to pass Chapter 246, S.F. No. 1569, prescribing the boundaries of Minnesota's legislative districts. This bill was subsequently determined to be validly enacted law. The United States Supreme Court has consistently declared that when a state had enacted a redistricting plan, courts may not pre-empt the redistricting responsibility or intrude on state policy unless necessary to correct an unconstitutional plan.

A court's first responsibility is to determine whether any errors in an enacted plan are so pervasive as to invalidate it entirely, requiring adoption of an alternate plan. If the plan is not incorrectly invalid, the court must ascertain the nature and scope of each error and modify the legislative plan to the extent necessary to correct such defects.

Our detailed analysis of Chapter 246 demonstrates that there are numerous errors in Chapter 246 as enacted. The legislature's curative amendments propose approximately 160 changes in 65 pages of text. Some of the proposed amendments clarify wording and are only refinements in language which are not necessary to discern the boundaries of districts. Other proposed changes, however, point to substantive errors requiring changes to correct defects in the statute.

In addressing the needed substantive changes, some corrections are obvious, and there is no need to employ the rules of statutory construction or to refer to legislative history. In other instances, the errors can be rectified by reference to the context of the language, the geographic context of the district or by referring to the maps or tables which form part of the legislative history. In the remaining instances where corrections and adjustments are required and legislative intent does not provide direction, we have drawn the boundaries by attempting to preserve surrounding constitutional boundaries, and by examining the submissions of the parties and weighing these and other alternatives against our adopted criteria. In no instance have we found the problems to be so incorrectable that the basic plan must be abandoned.

Plaintiff-intervenors have urged acceptance of a substantially different plan with better numerical balance. We recognize that the primary objective of redistricting is to achieve population equality in all state districts. Courts have, however, uniformly recognized that population deviations of ten percent or less in legislative plans do not affect the plan's constitutionality. The limited population deviations in the corrected Chapter 246 are in almost all instances well within the stated two percent goal. To accept an alternative plan with slightly lower population deviations over an enacted legislative plan would require us to disregard an entire body of established redistricting case law.

Plaintiffs have requested that we also establish boundaries for congressional districts. Although we have established criteria for a congressional redistricting plan, we have deferred action until the legislature and the governor have an opportunity to enact a constitutional plan. One plan has been reported out of the committees and the legislature is scheduled to meet from January 6 through January 17, 1992, to consider the issue.

The reasons to proceed in reviewing the legislative redistricting plan have been fully addressed in our preceding orders. In keeping with the parties' requests, we are attempting to have final reapportionment in place in advance of the February precinct caucuses and to provide some certainty to local units of government who are anxious to begin their own redistricting process. We accept the principle established in *Scott v. Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 1527 (1965), that state courts have a primary obligation to review redistricting issues. By proceeding as swiftly as possible, we intend to provide any time necessary for an orderly appeal process and to avoid any duplicative litigation in the federal courts. Finally, our extended analysis of Chapter 246 has left us with an enduring realization that drawing accurate and verifiable legislative boundaries for Minnesota's 201 districts is a complex and time consuming operation. In the interest of specificity and exactness, we want to provide sufficient time to examine and exclude any technical errors. Permitting the parties to examine the preliminary legislative redistricting and identify any errors before the final December 3, 1991 hearing and adoption should aid in this process.

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil No. A-91-CA-425
Civil No. A-91-CA-426
Civil No. A-91-CA-428

LOUIS TERRAZAS, *et al.*

vs.

BOB SLAGLE, *et al.*

SUMMARY OPINION AND JUDGMENT

[Filed Dec. 24, 1991]

Before the Court is plaintiffs' motion for implementation of interim plan filed in case number A-91-CA-425 on November 14, 1991; plaintiffs' request for implementation of interim plan filed in case number A-91-CA-426 on November 27, 1991; Intervenor Simms and Lucio's request for implementation of interim plan filed in case number A-91-CA-426 November 27, 1991; Intervenor Sibley's request for interim relief filed in case number A-91-CA-426 November 27, 1991; and plaintiffs' request for implementation of interim plan and consolidation hearing filed in case number A-91-CA-428 on November 27, 1991. On December 10 ,1991 this Court began a nearly four-day hearing on these various motions at which time the argument of counsel, testimony of witnesses, and other evidence was offered into the

record. Upon review of the motions, the responses filed, the file of this case, and the evidence and argument presented at the hearing the Court is of the following opinion.

I. BACKGROUND

Rarely has the procedural background of a case been more convoluted or important than in the instant causes dealing with redistricting in Texas following the 1990 Decennial Census. On February 7, 1991 various individual Hispanic voters (*Mena* plaintiffs) filed suit in Hidalgo County District Court, 332nd Judicial District of Texas, challenging the figures published in the 1990 Decennial Census on the grounds that said figures grossly underrepresented the number of Mexican-Americans and African-Americans in Texas. This census undercount, the argument continued, could potentially operate to deprive these minority groups of their voting rights under article I, sections 3, 3a, 19 and 29 of the Texas Constitution. A census undercount case was also filed by the *Mena* plaintiffs in the United States District Court for the Southern District of Texas, later amended to include redistricting challenges. No significant action has taken place in the Southern District case, nor was a three-judge panel ever impaneled there. While the state lawsuit was underway, the Legislature reapportioned state senatorial and representative districts using the 1990 census without adjusting for any undercount. The Legislature later reapportioned congressional districts in House Bill 1 ("HB 1") also using unadjusted census figures. All three plans were submitted to the Justice Department for preclearance as required by Sec. 5 of the Voting Rights Act.

Meanwhile, on May 23, 1991 plaintiffs Terrazas, Angelo, and Craddick ("Republican plaintiff") filed three separate lawsuits invoking this Court's jurisdiction under the Voting Rights Act and Fourteenth and Fifteenth Amendments challenging the reapportionment scheme

adopted by the State Legislature for the Texas House of Representatives, Texas Senate, and United States Congress in case numbers 425, 426, and 428 respectively. A three-judge panel was convened in these cases on June 24, 1991. After the Republican plaintiffs filed their instant lawsuits, the *Mena* plaintiffs amended their state pleadings to challenge the validity of House Bill 150 ("HB 150)), (House), and Senate Bill 31 ("SB 31"), (Senate), to require that legislative districts be redrawn using adjusted population figures. The same various state officials (the "state defendants"), among others, were named as defendants in both state and federal cases. There were now both state and federal lawsuits running parallel attacks on the 1990 redistricting statutes passed by the Texas Legislature. As evidenced by the record in this case, these "parallel" suits would cross, intertwine, and tangle to the point that the next round of primary elections in Texas may not occur as scheduled without action by this Court.

It was the state case that first caused this Court to review the substance of the Republican plaintiffs' Complaints. On July 29, 1991 the State Defendants filed a motion to stay state court proceedings, requesting this Court stay the Hidalgo County proceedings, arguing that a state court order requiring the State of Texas to use population numbers other than those reported in the 1990 Decennial Census could place the state defendants in the quandary of having to comply with a state court order that could eventually be found in contravention of federal constitutional principles by this Court. In the interest of avoiding such a state and federal constitutional conflict, the argument continued, a stay of state proceedings was warranted. Finding the defendants' posture did not entitle them to injunctive relief, this Court denied the motion by Order entered August 2, 1991. On August 5, 1991, the state court commenced hearing on the *Mena* plaintiffs' application for temporary injunction and partial summary judgment, with the state defendants, rep-

resented by the Attorney General, defending the validity of the reapportionment statutes passed by the Legislature.

On August 22, 1991 the state court granted plaintiffs' requested relief, declared the 1990 Decennial Census undercounted minority populations in Texas, and ordered the state to submit new plans using adjusted figures by September 30, 1991. The state promptly filed an appeal with the Texas Supreme Court, requesting a stay of the trial court proceedings pending the appeal. The Supreme Court granted the stay on September 24, 1991.

While the Attorney General had filed an appeal, he was actively working with the *Mena* plaintiffs in an attempt to resolve their differences with respect to the Texas Senate. By October 7, 1991, nineteen of the state's thirty one senators unofficially approved an agreement settling the dispute with the *Mena* plaintiffs regarding the Texas Senate. Because the stay of the *Mena* proceedings remained in effect, plaintiffs filed a new lawsuit in Hidalgo County styled *Quiroz v. Richards*, and entered an agreed judgment in that case memorializing the senate settlement—all on the 7th of October, 1991. Part of that Judgment ordered that elections for the state Senate be held under the alternate districting plan agreed to by the parties in *Quiroz*. As a result, the Texas Secretary of State notified the Department of Justice ("DOJ") that SB 31, even though it had been passed by both houses of the State Legislature, would be withdrawn from consideration for preclearance, and that the *Quiroz* Senate plan would be promptly substituted in its place. SB 31 had been before the DOJ for 59 days when the Secretary of State removed it from consideration.[1] The DOJ granted preclearance approval of the *Quiroz* plan on November 18, 1991. Though they had been defenders of SB 31 throughout the trial proceedings, as far as the

[1] Sec. 1973c requires the DOJ to grant preclearance or issue its objections within 60 days of submission of the proposed voting change.

State Defendants were concerned the *Quiroz* plan was now the law under which elections would take place for the Texas Senate.

As the procedural shenanigans continued to unfold in the state proceedings, this Court issued various scheduling orders commanding the parties in the instant causes to submit briefs and proposed interim plans for review in the event preclearance would not be obtained in time for the 1992 primary elections to proceed. On October 9, 1991 the Republican plaintiffs requested a temporary restraining order with this Court seeking to enjoin the State from substituting the *Quiroz* plan with the DOJ in place of SB 31, and further enjoin the state defendants from engaging in similar settlement activities that could result in HB 150 being replaced by another agreed plan.[2] A hearing on this motion was held October 23, 1991, and is maintained under advisement to date. The Republican plaintiffs also challenged the *Quiroz* plan in a mandamus action before the Texas Supreme Court. Though Republican plaintiffs had never intervened in either of the state cases, the Texas Supreme Court found they had standing to challenge the activities of the Attorney General and the rulings of the trial judge, and conditionally granted the writ in a plurality opinion delivered December 17, 1991. Finding the Attorney General did not exceed his authority in negotiating the *Quiroz* and *Mena* settlements, the Court did find that it was an abuse of the trial judge's discretion to accept the *Quiroz* plan without any adversary proceeding given the tremendous public impact of such a judgment. The effect of this opinion was to void the *Quiroz* plan, place the *Mena* settlement for the House into question, and return

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[2] The state parties have since reached a similar agreement with the Texas House plan, and have submitted their alernative plan to the DOJ for review. The DOJ had lodged objections to HB 150 by letter dated November 12, 1991, finding the plan passed by the Legislature diluted minority voting strength in several specific areas of the state. The Mena settlement for the Texas House purported to address concerns voiced by the DOJ.

the case to the trial court for a full hearing before entry of judgment.

This panel did not have the benefits of the views of the Texas Supreme Court when the parties in the instant cause came before it for hearing on what interim relief, if any, should be fashioned to ensure the 1992 primary elections proceed as scheduled under plans that pass muster under the Voting Rights Act and the U.S. Constitution. As it stands at the time of this Opinion, there are no legal plans reapportioning seats for election to the Texas House or Senate that have been precleared by the DOJ. Only HB 1, the plan passed by the Legislature in special session reapportioning seats to the United States Congress, has received preclearance and not been successfully challenged under state law. On December 20, 1991, the DOJ filed with this Court notice that it reserved formal comment on its views regarding SB 31 or whether the *Mena* settlement addressed its concerns with HB 150 until an unspecified date. Accordingly, this Court has reviewed HB 150, SB 31 and HB 1 in light of the Republican plaintiffs' claims, the concerns of parties *amicus* and Intervenors, the DOJ's objections to HB 150, and the requirements of the Voting Rights Act and Fourteenth and Fifteenth Amendments to the U.S. Constitution.

II. FEDERAL STANDARDS FOR REDISTRICTING

Title 42 United States Code Sections 1973 et seq. were originally enacted by Congress in the Voting Rights Act of 1965. An attempt to increase the protection afforded minority voters under the Fourteenth and Fifteenth Amendments, the Act was further strengthened by amendment of Sec. 1973 ("Sec. 2") in 1982 by establishing a totality of the circumstances effects test for minority vote dilution. This forgiving standard alleviates a plaintiff's burden of proving discriminatory intent as traditionally required to prove a violation of the Fourteenth and Fifteenth Amendments. *See City of Mobile, Alabama v. Bolden*, 446 U.S. 53, 70 (1980). Section 1973 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, as provided in subsection (b) of this section. (emphasis added)
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S. Sec. 1973 (West Supp. 1991).

This standard does not require that minority candidates be elected to public office in numbers equal to their percentage of voting age population. Rather, upon review of the totality of the circumstances, a plan redistricting legislative seats fails to satisfy the requirements of Sec. 2 if it: (1) dilutes the voting strength of a minority group populous and concentrated enough to constitute a voting majority in a single district by frustrating the electoral choices of the minority group due to the bloc voting of other voters in the district; or (2) the number of districts in which minority candidates may be

successfully elected are reduced due to disproportionally "packing" that minority group into select districts. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). Though *Gingles* dealt with vote dilution in the context of multi-member districts, courts in this Circuit have adopted the use of its test in single-member district litigation. *See e.g., Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *Ewing v. Monroe County, Mississippi*, 740 F. Supp. 417 (N.D. Miss. 1990). In *Brewer*, the Circuit held the standard in *Gingles* is essentially a threshold a plaintiff must cross before the Court reviews the propriety of a given plan under the totality of the circumstances test. *Brewer*, 876 F.2d at 450. *Gingles* also served to narrow the Court's review of the circumstances to focus on the extent minority groups have been able to elect candidates of their choice, and the extent to which voting is polarized. *Gingles*, 478 U.S. at 48, n. 15. There is ample evidence in the record, including the concession of counsel for the State that there is a strong history of polarized voting in Texas.

Plaintiffs have also alleged all three reapportionment plans passed by the Texas Legislature are replete with partisan gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment. Intervenor Sibley makes similar assertions, focusing particularly on one Senate district. In 1986, the United States Supreme Court in *Davis v. Bandemer*, 478 U.S. 109 (1986), held that partisan gerrymandering claims are justiciable, though it offered little hope that political plaintiffs might prevail on such claims. Under *Bandemer*, a plaintiff challenging a plan must show: the plan intentionally discriminates against a political group; the plan will have a long term disproportionate effect on that group's election of representatives; *and* the effect of the redistricting scheme as a whole consistently shuts out that group from the political process in that state. *Id.* at 141-143. This Court's analysis of the evolving law in this area falls

outside the scope of this opinion, and the evidence before it at the present time. The parties may have ample opportunity to make a more complete record during the trial on the merits, which the Court presumes will not take place until after the 1992 elections.

A brief recitation of the responsibilities of the DOJ is also in order at this point. Since 1975, Texas has fallen within the scope of Sec. 5 of the Voting Rights Act which requires that any changes in voting law in a covered state be precleared by the DOJ before they may be implemented. 42 U.S.C. Sec. 1973c (West 1981). A Sec. 5 review is primarily concerned with whether the proposed change causes a retrogression in minority voting strength, though DOJ guidelines currently require the plan to be scrutinized for noncompliance with Sec. 2 before preclearance may be obtained. *See City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983); *Beer v. United States*, 425 U.S. 130, 139-141 (1976); *and* 28 C.F.R. Sec. 51.54(a) (1991); 28 C.F.R. Sec. 51.55(b) (1991). The State also bears the burden of showing that the proposed voting change was not enacted with a discriminatory purpose. 28 C.F.R. Sec. 51.52 (1991).

Preclearance of a proposed plan does not bar a subsequent court proceeding brought under Sec. 2. 42 U.S.C. Sec. 1973c. Should this Court find that any of the plans fail to satisfy the federal requirements, it is within the ambit of this panel's discretion to draw remedial plans that may not otherwise comply strictly with the requirements for fashioning permanent remedies in order to ensure that elections proceed as scheduled. *See Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Burns v. Richardson*, 384 U.S. 73, 85-86 (1966). Any plan drawn by this Court is also exempt from the preclearance requirements of Sec. 5. *Connor v. Johnson*, 402 U.S. 690, 691-692 (1971).

II. REVIEW OF THE 1990 REAPPORTIONMENT PLANS

A. *United States Congress*

Republican plaintiffs challenge the following congressional districts drawn in HB 1: Districts 1, 2, 4, 5, 6, 8, 9, 13, 14, 17, 19, 21, 22, 23, 24, 28, 29, and 30. None of these districts generated an objection from the DOJ, and the plan received preclearance on November 18, 1991. Plaintiffs' Exhibit 76. With regard to districts 1, 2, 4, 5, and 8, Republican plaintiffs assert that minority communities were split to protect Anglo Democrat incumbents. Upon review of the population data for the counties that comprise these districts, and comparison of the population analysis reports ("PAR Reports") for HB 1 and the Republican proposed plans, this Court finds there are not a sufficient number of minorities in the counties comprising these districts to enable minorities to elect a candidate of their choice, that HB 1 does not regress the number of minorities in the districts as drawn, and that the Republican plan actually has fewer minorities in their proposed districts resulting in an average Anglo voting age percentage of 81.48% compared with an average of 80.36% in HB 1. *See* Plaintiff's Exhibits 77a-g, and Exhibits 85a-g. Similar claims were lodged against districts 13, 17, 19, 21, 23, and 28, though in this instance the Republican plaintiffs argued the districts as drawn in HB 1 were drawn as the result of political gerrymandering. This Court finds the plaintiffs have offered no sufficient evidence in support of their political gerrymandering argument pertaining to these districts, and that they likewise contain an insufficient number of minority residents to support a finding that the districts as drawn dilute minority voting strength.

As for districts 6, 9, 14, 22, 24, and 29, the Republican plaintiffs allege that districts 25 and 8 are regressed at the expense of creating district 29 as a Hispanic district, and that the other districts were drawn to dilute Re-

publican voting strength. Again, the plaintiffs have offered little evidence in support of their political gerrymandering claims. A comparison of the minority voting age populations of districts 25 and 8 also reveals that the number of minorities residing in the counties comprising each district is insufficient to elect a candidate of their choice, and that the number of minorities placed in those districts under HB 1 does not serve to dilute the minority voting strength in adjacent minority majority districts 18 (Black) and 20 (Hispanic). District 20 is a new Hispanic congressional seat in Harris County. The percentage of minority voting age populations for the plaintiffs' proposed versions of the two minority seats in Harris County are within a percentage point of those in HB 1. *See* Court's Exhibit 1; Plaintiff's Exhibits 77a-g, and Exhibits 85a-g.

Plaintiffs' remaining challenges to HB 1 involve a minority district encompassing the Dallas metropolitan area. District 30 in Dallas County is a new minority majority district drawn to elect a Black congressional candidate. While the 61.5% Black and Hispanic voting age population ("VAP") is commendable, the configuration of District 30 closely resembles a microscopic view of a new strain of disease, and has been the subject of well-deserved national ridicule as the most gerrymandering district in the United States. Though this Court is concerned with the flagrant abandonment of compactness and preservation of communities of interest in this district, the Court further finds that a primary motive for any gerrymandering was to enhance Black voters' ability to elect a candidate of their choice. The mere fact that the Republican plaintiffs have fashioned a more compact District 30 with identical voting age population percentages, though more aesthetically pleasing, does not give rise to a finding of a Sec. 2 violation by this Court at this time. This Court further finds that District 30 as drawn in HB 1 does not dilute the minority vote in ad-

jacent districts, including Hispanics, as has been found in the House and Senate plans passed by the Legislature. For the reasons set forth in this section of the opinion, and the fact HB 1 has received preclearance from the DOJ, this Court finds plaintiffs' claims for preliminary relief fail to meet the standard for injunction to issue at this time, and that the 1992 primary elections for U.S. Congress may be conducted pursuant to HB 1.

B. *Texas Senate*

As discussed *supra*, there is presently no legally enacted state plan redistricting the Texas Senate that has received preclearance from the DOJ. Accordingly, this Court must scrutinize SB 31 for Sec. 2 and constitutional deficiencies as alleged in plaintiffs' complaint without the benefit of the DOJ's comments, if any, compiled during its 59 day review of that plan. Most of the issues raised in intervenors' complaints are either rendered moot by the Texas Supreme Court's December 17, 1991 opinion in *Quiroz*, or are not relevant to this Court's review of SB 31 at this time. This Court specifically finds that the *Quiroz* settlement plan is not valid under state law, but merely an alternative proposal submitted to the Court that because of the actions of the Secretary of State happened to receive favorable review by the DOJ.

Plaintiffs challenge the validity of Senate districts 1, 2, 3, 4, 9, 12, 15, 17, 19, 23, 26, and 31. With regard to District 15, this Court is persuaded by plaintiffs' claim that SB 31 does not create a credible Hispanic senate district in Harris County, but actually dilutes minority voting strength by placing 50.8% voting age Hispanics in that district as compared to the district 15 fashioned by this Court with 51.5% Hispanic voters. Plaintiffs argue that minorities which could have been placed in district 15 to make it a stronger minority majority district were splintered into district 11 to protect an Anglo incumbent. This Court's interim plan also increased the

Black VAP in District 15 from 14.9% to 15.9%, boosting the combined Black and Hispanic VAP in that district by almost 2%. Due to the configruration of Court district 15, the Cort's interim plan also increased the Black VAP of District 13 from 50.4 to 57.2%. The combined effect of the Court's interim Districts 15 and 13 significantly increases the voting strength of minorities in Harris County by ensuring that both a Black and Hispanic state senator will probably be elected from Harris County. This probability was not as great under SB 31.

Turning to North Texas and the Dallas-Fort Worth metropolitan area, plaintiffs challenge districts 2, 9, 12, and 23. Under SB 31, District 12 generally outlines the City of Forth Worth and contains 64.9% Anglo VAP, with approximately 18% Black VAP and 15% Hispanic VAP. This district is presently held by an Anglo incumbent. District 23 as drawn by SB 31 is promoted as a strong Black district that outlines the center of Dallas County, with 44.2% Black VAP, and a combined Black and Hispanic VAP of 67.7%. This Court's review of these districts and the voting tabulation districts ("VTD's") they are comprised of indicates that District 12 could be drawn as a strong minority impact district without diluting the Black voting population's chances of electing a state senator in District 23. District 12 as fashioned by this Court takes the Hispanic community concentrated in West Dallas and part of Irving and links it with the Black community in south central Tarrant County. The result is a district with a combined Black and Hispanic VAP of 48.5%. Under the Court's interim District 12, minority groups will have a significantly greater impact than in District 12 as drawn by SB 31. The Court's interim plan also increases the Black VAP in District 23 almost 2% to 45.6%, while the combined minority VAP remains strong at 64.4%. Black and Hispanic voters are thus provided a greater degree of participation in the political process than under SB 31.

In order to ensure that District 23 contained the requisite number of Black VAP, the Court's interim plan takes a number of VTD's from District 2, presently held by an Anglo incumbent, forcing District 2 to seek population elsewhere in order to keep its deviation at an acceptable level. The configuration of the Court's interim District 12 as a minority impact district also causes District 9 to be redrawn to include some of the population that SB 31 included in District 2 southeast of Dallas. Consequently, the addition of interim District 12 causes districts 1, 2, 3, 8, 9, 22, and 30 to be slightly adjusted. This Court's review of District 9 reveals SB 31 departed radically from the traditional configuration of that district. Because the Court's drawing of District 12 as a minority impact district makes the Legislature's version of District 9 impossible to reasonably approximate, the Court's plan largely restores that district to its traditional counties of composition, and has done so without unacceptably deviating from ideal population.

Plaintiffs' remaining challenges, and this Court's only other area of concern with SB 31, involve those districts drawn by the Legislature in South Texas and the Rio Grande Valley. All parties conceded at the December 13th hearing that SB 31 was perceived as "dead on arrival" at the Justice Department because the plan failed to create stronger Hispanic districts in Bexar County, or address the concerns of Hispanic voters in the districts running South to the U.S.-Mexican Border. SB 31 only creates four (4) districts in South Texas that would appear to ensure election of a Hispanic candidate in that area. This Court concurs with those concerns, finds SB 31 likely does not comply with the mandate of Sec. 2 and interpretive case law, and has fashioned interim districts in those areas that afford Hispanics six (6) state Senate seats in South and West Texas. This Court specifically finds that Districts 19 and 26 as drawn in SB 31 likely fail to meet the requirements of Sec. 2.

Under the Court's interim plan the Hispanic districts include numbers 19, 20, 21, 24, 27, and 29. These numbers correspond to SB 31's districts, 19, 20, 21, 25, 27, and 29 respectively. Under SB 31, District 25 is not a Hispanic district, yet this Court's interim District 21 approximates the same geographical area. The Court was able to craft its District 21 as an Hispanic district by absorbing part of SB 31's District 26, and allowing District 21 to extend further south by redrawing the three (3) districts running through the Rio Grande Valley.

Under SB 31, District 19, the Hispanic district wholly contained in Bexar county, offers 47.6% Hispanic VAP, with only 39.3% registered voters with Spanish surnames. This Court finds that District 19 as drawn in SB 31 likely fails to comply with Sec. 2's requirement that the minority group be able to elect a candidate of its choice, because the percentage of Hispanic voter turn out is too weak. This Court was able to fashion its interim District 19 to provide 56.2% Hispanic VAP, and 48.7% voters registered under a Spanish surname. District 20 in SB 31 boasts a 58.0% Hispanic VAP and accompanying 50.6% voters registered under Spanish surnames. This Court's interim District 20 almost mirrors those numbers, but it is drawn in such a way that Districts 24 and 21 may be drawn to create one district well above the deficient level provided in SB 31's District 26, and another district approximating the percentages in SB 31's District 21. For example, interim District 24 under the Court's plan contains 54.2% Hispanic VAP with a 48.0% voters registered under Spanish surnames. SB 31's District 26 contained only 51.4% Hispanic VAP, and a remarkably lower 42.7% voters registered under Spanish surnames. This Court notes that the overall percentages in its Hispanic districts are slightly stronger than those proposed in the *Quiroz* settlement plan that received preclearance by the DOJ.

Given the Court's substantial changes to the plans as drawn for South Texas, Dallas, and North Central Texas, unrelated districts are affected. In drawing the remainder of the State to accommodate the specific changes made by the Court plan, every attempt was made to place as many counties in the interim districts in the same numbered district as they would have been under SB 31. We consider ourselves to have been successful in this attempt, as fully half of the Senate Districts, namely those in West and East Texas, are substantially the same as under SB 31. The Court made every attempt to preserve the legislature's will in those areas of the state where no violations of the Voting Rights Act were found to occur.

C. *Texas House of Representatives*

On November 12, 1991 the DOJ issued its objections to HB 150 in a letter transmitted to the Texas Secretary of State. Noting the most significant demographic change in Texas in the past ten years to be the increase in Hispanic population, the DOJ's objections dealt wholly with the dilution of Hispanic voting strength in El Paso, Bexar, and Dallas Counties, and voiced concerns with districts in the Rio Grande Valley and South Texas. Upon review of the letter and the DOJ's findings, this Court finds considerable merit in the specific objections and has attempted to fashion a remedial plan yet remain loyal to those portions of the state in which no DOJ objections were lodged. This was accomplished to a much greater degree than the Court's interim Senate plan because most House districts changed fell within whole counties and did not effect other lines running through the rest of the state. Other than those areas of the state touched by the DOJ's objections, this Court finds plaintiffs challenge to HB 150 fail given the state of the evidence before the Court at the present time.

Though the DOJ's objection to Dallas County is far from clear, this Court's review of Districts 99 through

114 as drawn in H.B. 150 shows that Hispanic voters were fragmented into various districts completely diluting their ability to elect a candidate of their choice in *any* district in Dallas County. This Court further finds that the Hispanic population in Dallas County has grown significantly in the past ten years to the degree Hispanics as a voting group are capable of clearly electing a candidate of their choice in a minority majority Hispanic district, and participate significantly in the election of a candidate in an Hispanic impact district. This can be accomplished without diluting the ability of Black voters to elect at least four (4) candidates of their choice in Dallas County. In attempting to fashion such districts, this Court found its efforts remarkably paralleled those of the *Mena* plaintiffs' proposals, and therefore adopts that portion of their proposed redistricting plan that encompasses Dallas County. Under the Court approved interim plan, District 104 is a Hispanic district yielding 58.5% Hispanic VAP, while District 103 is a Hispanic impact district offering 41.3% Hispanic VAP, and a combined minority VAP of 53.4%. Districts 100, 109, 110, and 111 remain at percentages strong enough for Black voters in those areas to elect candidates of their choice.

H.B. 150 apportioned El Paso County into five districts. The DOJ objected to HB 150's reduction of Hispanic population in District 76, presently held by an Anglo incumbent. Though District 76 lies between two districts with Hispanic VAP in excess of 80%, the DOJ found the Hispanic voter registration was reduced by about four percentage points without an adequate justification. This was particularly objectionable in light of the DOJ's finding that Hispanic voter registration had increased in that district over the past ten years, inferring the reduction was intended to protect an Anglo incumbent. Under this Court's interim plan, Hispanic population flowed from Districts 75 and 77 in order to increase the percentage of Hispanic VAP in District 76 from 66.7% to 72.0%. Districts 75 and 77 were reduced

to Hispanic VAP's of 82.5% and 80.6% respectively. It is the opinion of this Court that the El Paso districts as drawn by the Court no longer dilute minority voting strength in District 26, and otherwise comply with Sec. 2.

The DOJ's objections to Bexar County focused on the apparent regression of Hispanic voting strength in District 117 resulting from the packing of Hispanics in District 118. While the DOJ did not object to the number of Hispanic seats drawn in H.B. 150 in Bexar County, which numbered five (5) with Hispanic VAP above 55%, this Court finds that an interim plan can and should be drawn to provide Hispanics seven (7) districts with Hispanic VAP above 55%. This Court further finds District 117 as drawn under HB 150 is not an Hisapnic seat as the Hispanic VAP is well under 55%. This Court's interim plan for Bexar County essentially mirrors the proposals offered by the *Mena* plaintiffs. Their proposals had been submitted to the DOJ in an attempt to obtain withdrawal of the Department's objections.

Objections were also made to the districts drawn in H.B. 150 located south and southwest of Bexar County, and north of Cameron and Hidalgo counties. The Legislature drew distinct lines 43 and 44 in an east-west manner that had the effect of packing Hispanics in the southern districts and overpopulating Anglos in the northern districts. The DOJ noted that this problem would have been alleviated had the districts been drawn in a north-south configuration, and that an additional Hispanic district could have been created. This east-west configuration was viewed by the DOJ as intended to protect an Anglo incumbent. Under H.B. 150, the Hispanic VAP of District 43 is 75.0% while the VAP of District 44 is only 46.9%. These districts as drawn by the Court maintain District 43 at 66% Hispanic VAP, while increasing the Hispanic VAP in District 44 to 54.5%, and remedy the problems identified by the DOJ.

Finally, this Court concurs with the DOJ's objections to the reduction of Hispanic VAP in District 38 to protect an Anglo incumbent. This Court's interim plan moved Hispanics from District 36 into District 38, increasing the Hispanic VAP from 67.6% to 72.9%, while maintaining the Hispanic VAP in District 36 at 74.4%. In order to arrive at an acceptable deviation level, the Court also moved a small number of Anglo voters from District 38 into District 37. This change had no appreciable effect on the Hispanic VAP in District 37.

IV. JUDGMENT

It is the intention of this Court by this Opinion and Judgment to provide for a valid and equitable interim state legislative redistricting plan in the current circumstances in which no valid plan exists under federal law, and by this Opinion and Judgment to provide for the holding of elections in Texas without delay and in accordance with existing state law. In developing equitable interim state legislative redistricting plans the Court has sought primarily to provide new or improved state House and Senate districts that provide a realistic opportunity for the election of racial and ethnic minority candidates. Any partisan effects resulting from this effort are apparently a natural and unavoidable consequence of the Court's emphasis on the interests of long-neglected minority concerns.

This Court has sought diligently, where appropriate, to adhere to the legitimate districting intent of the state legislature and, where federal constitutional and statutory prohibitions are not offended, to give effect to the will of that body. A conscientious inquiry, however, reveals even to the most casual political historian the long history of federal court intervention in Texas redistricting schemes in order to provide minimal protection to the electoral interests of racial and ethnic minorities. While past state legislatures have paid some tribute to

these important interests, partisan concerns and preservation of incumbents appear paramount on the decennial legislative agenda. The time-honored effects of adherence to these more parochial concerns have sometimes been an unspoken disservice to minority representation.

As the Regular Session of the 72nd Legislature concluded with the approval of H.B. 150 and S.B. 31, those state officials charged with presenting these legislatively-approved plans to the Department of Justice for required Voting Rights Act preclearance seemed unusually lethargic. This inaction is a central reason for the need of federal judicial action at this time in an effort to protect minorities' constitutional and statutory voting rights.

The legislative history of H.B. 150 and S.B. 31, coupled with the leisurely presentation to the Justice Department provides this Court with no real hope that further deference to the legislature at this time would yield any result other than continued protection of some members' self-interests to the exclusion of minorities' rights. For the interim, this Court will exercise its constitutional responsibilities to provide protection to this latter group of often-neglected Texas citizens. Based on the findings and legal conclusions set forth in this Opinion it is the Judgment of this Court that the 1992 primary elections proceed as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-428 is DENIED, and that elections should proceed on an interim basis under the congressional plan as drawn in HB 1;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-426 is GRANTED, and that primary elections for the Texas Senate will be conducted under this Court's interim plan attached as Appendix A to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs' request for interim relief filed in cause number A-91-CA-425 is GRANTED, and that primary elections for the Texas House of Representatives be conducted under this Court's interim plan attached as Appendix B to this Judgment;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the candidate filing deadlines for the 1992 primary elections are extended to January 10, 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the residency requirement for candidates to the Texas Senate, and Texas House of Representatives are hereby waived for elections held under the State House and State Senate interim plans in 1992.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Joint Motion for Interim Relief filed in all three causes December 6, 1991 is GRANTED, and that election precincts may be consolidated as contemplated in those motions.

SIGNED AND ENTERED this 24th day of December, 1991.

/s/ James R. Nowlin
JAMES R. NOWLIN
United States District Judge

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

Garwood, Circuit Judge, dissenting in part:

I join the majority's judgment and its essential reasoning in all respects except as follows:

In light of the fact that the Texas legislature has recently been called into special session commencing January 2, 1992, for the purpose of redistricting, in my view this Court's Order should expressly provide that in the event legislation is enacted effecting alternate redistricting, and/or postponement of the 1992 primary elections, and such legislation is precleared by the Department of Justice, and found not invalid by this or another court if challenged, and all this transpires in time such that review thereof by the Department of Justice and by this Court can be had and thereafter the presently scheduled 1992 primary elections, or 1992 primary elections pursuant to any such postponed date (if any such postponement is timely precleared by the Department of Justice and not sooner found invalid by this or another court), may properly take place in 1992, then the interim plan adopted by this Court shall be of no force or effect as to the body or bodies so redistricted. I believe that this much is required by deference to the legislature in these matters. *See, e.g., McDaniel v. Sanchez*, 101 S.Ct. 2224, 2236 n.30 (1981).

SIGNED AND ENTERED this 24th day of December, 1991.

/s/ Will Garwood
WILL GARWOOD
United States Circuit Judge

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

ORDER

[Filed Mar. 31, 1992]

Having been advised by the office of the Secretary of the State of Ohio that the date of June 2, 1992 for the primary election for the purpose of selecting candidates for membership in the General Assembly of Ohio to be voted upon at the General Election to be held November 3, 1992 as directed by order entered herein March 10, 1992 cannot be met and must be vacated, said primary election is hereby rescheduled to be held September 8, 1992. It is further ordered that the Secretary of the State of Ohio be and he hereby is enjoined to do all such acts as may be necessary for the holding of such primary election September 8, 1992.

/s/ Nathaniel R. Jones
NATHANIEL R. JONES
Circuit Judge

/s/ John W. Peck
JOHN W. PECK
Senior Circuit Judge

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

NOTICE OF APPEAL

[Filed Apr. 1, 1992]

Notice is hereby given that George V. Voinovich, Robert A. Taft II, Stanley J. Aronoff and James R. Tilling, Defendants in the above-captioned action, hereby appeal to the Supreme Court of the United States from the three-judge district court's Order of March 31, 1992. This appeal is taken pursuant to 28 U.S.C., §1253, and is in addition to the previous Notices of Appeal filed March 11, 1992 and March 25, 1992 from the three-judge district court's Orders of March 10, 1992 and March 19, 1992, respectively.

Respectfully submitted,

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NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91-CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

CERTIFICATE OF SERVICE

[Filed Apr. 1, 1992]

The undersigned hereby certifies that a true and correct copy of the Notice of Appeal in this case has been served by first-class United States mail service, postage prepaid, this 1st day of April, 1992, upon the following Counsel of Record in this case.

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Supreme Court, U.S.
FILED
MAY 1 1992
OFFICE OF THE CLERK

(3)

NO. 91-1618 (A-693)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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QUESTIONS PRESENTED

In a state where black legislators have regularly been elected because of very substantial white crossover voting, does the Voting Rights Act require that a state apportionment board draw majority-minority districts wherever possible?

Relying upon the federal supremacy of the Voting Rights Act, may a state apportionment board depart from state law and adopt a "policy" of majority-minority legislative districts statewide where there is no proof of legally significant racial bloc voting or inability of black voters to elect representatives of their choice?

Where Section 5 of the Voting Rights Act is not applicable, does a state apportionment board possess the unreviewable discretion to apply Section 5 remedies on a statewide basis?

Whether the trial court properly found that the Defendants-Appellants deliberately packed and fragmented black voters for the purpose of destroying coalitional voting of black and white voters in Ohio in violation of the Fifteenth Amendment.

Whether the trial court properly found that the Ohio Apportioning Board departed from the 10% total population deviation in legislative districts in violation of the Fourteenth Amendment of the United States Constitution.

LISTING OF ADDITONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES M. SPEROS, KENNETH THORNE, CHARLES WALKER, WILURT SHANKLIN, TYRONE RILEY, WILLIAM MALLORY, Representative of the 23rd Ohio House District, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District and MARY ABEL, Representative of the 94th Ohio House District.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-1618 (A-693)

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

**Appeal from the United States District Court
for the Northern District of Ohio**

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

OPINIONS BELOW

The January 31, 1992 Opinion and Order of the three-judge court has not yet been officially reported. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and is set forth in Defendants-Appellants' Appendix at App. 1a

The March 10, 1992 Order of the three-judge court has not yet been officially reported. It is set forth in Defendants-Appellants' Appendix at App. 118a.

The March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge court has not yet been officially reported. It is set forth in Defendants-Appellants' Appendix at App. 127a.

The March 31, 1992 Order of the three-judge court has not yet been officially reported. It is set forth in Defendants-Appellants' Appendix at App. 324a.

JURISDICTION

The Orders appealed from were filed by the three-judge court on March 10, 1992, March 19, 1992 and March 31, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

STATEMENT OF THE CASE

On September 19, 1991, before the publication of the State of Ohio's apportionment plan on October 1, 1991, the Ohio Apportionment Board majority ("Board") filed an original action in the Ohio Supreme Court. It asked that court to declare, *inter alia*, that the Board's plan complied with the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965. It also asked the court to enjoin the minority members of the Board, Messrs. Quilter and Ferguson, from instituting proceedings in other courts. This was the first of a series of actions taken by the Defendants-Appellants in an effort to deprive the federal courts of jurisdiction over their plan.[1]

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[1] The statement of the Defendants-Appellants that the Ohio Supreme Court, in the *per curiam* decision in *Voinovich* v. *Ferguson*, 63 Ohio St. 3d 198 (1992), "concluded that the plan of apportionment was constitutional under the Ohio Constitution" implies that the state court reached the same issues as the federal trial court below. *See*, Jurisdictional Statement of Defendants-Appellants, p. 4 n.3 [hereinafter Jur. State.]. In fact, the Ohio Supreme Court decided only one issue, in which it deferred to the Apportionment Board's alleged discretion on the question of whether Ohio's boundary requirements were to be honored at the expense of equal population representation. 63 Ohio St. 3d at 203. Having erroneously elevated the

Without fully detailing the myriad of ensuing procedural maneuvers in the courts below, the Plaintiffs-Appellees filed the present case in the United States District Court for the Northern District of Ohio on November 1, 1991, in order to have a federal court hear federal questions. The Chief Judge of the Sixth Circuit Court of Appeals thereafter on November 7, 1991 empaneled a three-judge district court.

In their November 1, 1991 Complaint, the Plaintiffs-Appellees alleged that the Board's plan impermissibly used race to draw state legislative and congressional districts and diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. They also asserted that the plan violated Article XI of the Ohio Constitution which provides specific apportionment guidelines. In response, Defendants-Appellants contended that the Voting Rights Act, as amended in 1982, and federal case law required that wherever possible the Board must create majority-minority districts, *i.e.*, legislative districts in which members of a minority group comprise the majority.

Extensive deposition and document discovery was conducted on an expedited basis. The trial court held hearings on December 3 and December 17, 1991. The parties submitted a full record for the court's review. On January 31, 1992, the trial court issued its decision holding that the Voting Rights Act and federal precedent did not dictate the mandatory *per se* creation of majority-minority districts. The court held that while the creation of such districts might be an appropriate remedy under certain circumstances, the Defendants-Appellants had failed to make the requisite factual findings demonstrating the necessity of applying any remedy under the Voting Rights Act. Opinion, 1/31/92, Defendants-Appellants' Appendix A at 2a [hereinafter D.A. App.].

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maintenance of several county and municipal boundaries over equal population in the districts, the Board violated the Fourteenth Amendment of the United States Constitution. *Gonnor* v. *Finch*, 431 U.S. 407, 416-417 (1977).

The trial court ordered the Board to reconsider its apportionment plan and directed that unless the Board could show justification under a totality of circumstances analysis for the configuration it adopted, the Board was required to submit a revised plan within 20 days of the date of the court's Order. The court stated that in the event that a revised plan was not received within the time limit, it would take further action *sua sponte*. *Id.* at 14a-15a. The trial record showed the sustained ability of black legislators to be elected with far less than a black majority, and an absence of significant racial bloc voting in Ohio. In these circumstances, *inter alia*, the court determined that "the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act." *Id.* at 14a.

Thereafter, on February 19, 1992, in response to the trial courts's Order, the Board for the first time submitted findings and conclusions in an attempt to justify its plan. It also submitted an apportionment plan which the trial court found was identical to the October, 1991 plan, except for the correction of "technical errors." Order, 3/10/92, D.A. App. C at 119a. The trial court found that the Board's second submission contained "only meager information that was not previously before this Court," and held that this "information is not of assistance in answering the 'question as to whether the political processes were "equally open",' nor does the analysis constitute the 'searching practical evaluation of the "past and present reality" ' contemplated by the legislative history of the 1982 amendments to the Voting Rights Act." *Id.* at 119a. The court also found that the Board's plan violated the Fifteenth Amendment of the United States Constitution. *Id.* Finally, the court enjoined any election for the Ohio General Assembly until a constitutional plan was submitted, appointed a Special Master to draw such a plan, vacated the May 5, 1992 Ohio primary date, and directed that a primary election be held on June 2, 1992. *Id.* at 119a-120a.

The Defendants-Appellants moved the trial court to stay its order of March 10, 1992, pending appeal to the United States

Supreme Court. On March 19, 1992, the trial court issued its Findings of Fact, Supplemental Memorandum of Law, and Order (D.A. App. D) denying the motion for stay pending appeal and supplementing its previous factual findings and legal conclusions on the merits. The trial court once again held that the Board's plan deliberately packed and fragmented black voters in violation of the Voting Rights Act and Fifteenth Amendment. D.A. App. D at 140a-143a. The court also found that the plan violated the Fourteenth Amendment because it departed from the 10% total deviation rule applied by the Supreme Court in *Connor* v. *Finch*, 431 U.S. 407, 416 (1977). D.A. App. D at 146a-148a.

By its order of March 31, 1992, the trial court reset the primary date for General Assembly elections in Ohio to September 8, 1992, due to the purported inability of the Secretary of State to comply with the June 2, 1992 date. On April 20, 1992, this Court stayed the trial court's Orders of March 10 and March 31, 1992, pending final disposition of the appeal.

ARGUMENT

I. THE STATE REAPPORTIONMENT BOARD MAY NOT WITHOUT PROOF ASSUME STATEWIDE VIOLATIONS OF THE VOTING RIGHTS ACT, APPLY A "REMEDY" WHICH PACKS AND FRAGMENTS BLACK VOTING STRENGTH AND DENY ANY OBLIGATION TO PROVIDE FACTUAL SUPPORT FOR ITS "REMEDY"

A. The Defendants-Appellants Justified Their Plan on the Basis of Alleged Voting Rights Act Violations, but Rejected any Obligation to Provide Factual Support for These Allegations

The Defendants-Appellants drew a plan of apportionment which from its initial stages to its final implementation has always been based upon the premise that the State of Ohio was requried by the Voting Rights Act, 42 U.S.C. § 1973, to create the maximum number of majority-minority districts. They justified this approach wholly on the grounds that it was mandated by the Voting Rights Act as interpreted by the holding of this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).[2] More recently, Defendants-Appellants have recast their justification for their plan of apportionment and now maintain that they have the unreviewable discretion to follow their mechanistic *per se* approach of creating majority-minority districts because their motives were "to avoid diluting minority voting strength," and to implement "the policy of the state of drawing minority controlled districts . . . ." Jur. State., pp. 8-10.

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[2] "In adopting the 1991 Apportionment Plan, Defendants corrected the voter dilution inherent in the Democrats' 1981 apportionment." Defendants' Pre-Trial Brief, Page 28. "Where opportunities exist, the State must *maximize* minority voting strength. Thus, it may be a violation of Section 2 for a state to fail to create a district in which minorities are the majority if such a district can be created. . . . Even if not a 'right,' maximization of minority voting strength may clearly be a 'remedy.'" *Id.* at pp. 32-33; see also, *id.* at pp. 13, 29, 36, 39.

The Defendants-Appellants' alleged "policy of the state" is nowhere to be found in any of four sources where Ohio law or policy customarily is set forth, *i.e.*, its Constitution, statutes, the legal decisions of its courts, or the Joint Resolutions of its legislature. In fact, this "policy" is solely the "policy" of the Defendants-Appellants, which they have sought to characterize as a Voting Rights Act "mandate." The trial record shows that rather than avoiding minority voter dilution, the Defendants-Appellants deliberately concentrated blacks into districts where they constituted excessive majorities, a practice known in political science literature on gerrymandering as "packing."[3] The record also demonstrates that the Defendants-Appellants packed black voters with the intent to destroy effective coalitional voting between blacks and whites in Ohio. D.A. App. D at 132a, 140a-143a.

The Defendants-Appellants claim the right to adopt a *per se* approach to creating majority-minority districts without any factual analysis to determine whether this "remedy" was necessary to overcome racial bloc voting that prevented black voters from electing representatives of their choice. The validity of this claim is essential to the successful defense of their plan. Even a minimal factual analysis by the Board would have shown that in Ohio there has been no legally significant racial bloc voting in the state's legislative elections. Black legislators have been regularly elected over sustained periods of time precisely because they continually enjoyed the support of either a majority or near majority of white voters in coalition with majority support from the black voters in their district. *Id.* at 133a n.2, n.3. The trial court found that the destruction of this coalitional voting of blacks and whites was the intentional "target" of the Defendants-Appellants' plan of apportionment. *Id.* at 132a-133a.

The Defendants-Appellants argue in this Court that they have no obligation to make any "totality of circumstances"

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[3] Parker, *The Mississippi Congressional Redistricting Case: A Case Study in Minority Vote Dilution*, 28 Howard L. J. 397, 399 & n.13 (1985).

analysis under the Voting Rights Act before creating majority-minority voting districts wherever possible. This argument is quite inconsistent with their prior admissions and representations to the trial court. Before the plan was adopted, public meetings were held around the state and at these meetings, James R. Tilling, the Board's secretary and official spokesman, as well as the sole "architect" of the plan, acknowleged the Board's obligation to "establish for the record the totality of circumstances in each urban area" to comply with the Voting Rights Act.[4]

Defendants-Appellants alleged at trial that they were preventing the continuation of Voting Rights Act violations which purportedly arose out of the 1981 apportionment of Ohio.[5] When the trial court inquired as to the factual basis of this allegation of prior Voting Rights Act violations, the Defendants-Appellants then adverted to the fifteen public meetings that Defendants-Appellants Tilling and Secretary of State Robert Taft held around the state, which they said, provided "the totality of circumstances" record upon which they relied.[6]

The trial court's logic in requiring the Board to make a "totalities" analysis derived from its accurate observation that "[a]s justification for these [majority-minority] configurations, Defendants assert that the Voting Rights Act and federal case law *mandate* the drawing of majority-minority districts." D.A. App. A at 7a-8a (emphasis added). The trial court disagreed with the "mandate" argument, holding that the Voting Rights Act contained "no requirement for majority-minority districts," but rather prohibited all "practice[s]" which result in the "abridgment" of the voting rights of a protected class. *Id.* at 8a.

Having determined that neither the Act nor this Court's decision in *Gingles*, *require* the creation of majority-minority districts (D.A. App. A at 8a-10a), the trial court reviewed the

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[4] D.A. App. A at 6a.

[5] *Id.* at 11a. *Accord:* Defendants' Pre-Trial Brief, at 26-28.

[6] *Id.* at 33-36.

issue of whether, as the Defendants-Appellants asserted, the majority-minority configuration was *permissible* to "remedy" alleged prior violations of the Voting Rights Act under the 1981 Ohio plan of apportionment. *Id.* at 11a. In this regard, the court noted that under the law, violations of the Voting Rights Act may not be assumed but that an in-depth analysis of the totality of the circumstances in the locality at issue is a prerequisite for such a finding. *Id.* The court found the evidence supplied by the Defendants-Appellants to show violations under the 1981 plan to be "grossly inadequate." *Id.*

To support its finding that the evidence was "grossly inadequate," the court observed that the evidence showed no proof of the two essential factual determinants: (1) significant amounts of racial bloc voting; and (2) the inability of minority candidates to be elected because of racial bloc voting. *Id.* at 11a-12a. The court found that each of the 11 current black legislators in Ohio had been continuously elected to between six and 13 terms. For the elections between 1984 and 1990, each black legislator was elected with an average plurality ranging between 68.27% and 72.64%. Under the 1981 apportionment plan, the black population in the black legislators' districts ranged from 38.5% to 53.19%, yet under the 1991 plan the black population of these districts was increased between 7.7% and 13.68%. *Id.* at 7a.

The court deplored the fact that the Board did no regression analysis or extreme case analysis as was set forth in *Gingles*, to determine the extent of racial bloc voting. *Id.* at 11a-12a. The court also noted that the Board's spokesman, Tilling, equivocated on the issue of what constituted legally significant racial bloc voting and found it "disturbing" that Tilling's purported racial bloc voting analysis was based upon a casual analysis which had never been reduced to writing. *Id.* at 13a. The court criticized the failure of Tilling to "examine the voting record of any single representative to determine his responsiveness to the minority community." *Id.* Finally, the court rejected the anecdotal nature of the historical analysis performed by Tilling and the substitution of his personal experience for the "searching practical evalua-

tion of past and present reality" required by the legislative history of the Voting Rights Act. *Id.* at 13a-14a. In short, the court's analysis fully demonstrated that the evidentiary support for the "remedy" applied by the Board was, indeed, "grossly inadequate."

Since the Defendants-Appellants failed to supply a factual basis for their argument that 1981 Ohio Apportionment violations of the Voting Rights Act required a "remedy," the court held that there was no legal justification for a plan admittedly designed to create the maximum number of majority-minority districts. The court also held that in the absence of a legal justification for the remedy adopted, the Board through its plan packed minority voters, "with dilutive effects that violate the Voting Rights Act." *Id.* at 14a.

Packing and fragmenting are devices repugnant to any fair apportionment plan; but when they are used to dilute the effectiveness of black voters on a statewide basis, the Voting Rights Act is violated.[7] Moreover, when the same devices are intentionally and deliberately applied to gerrymander black voters the Fifteenth Amendment is violated.[8]

The Defendants-Appellants chose not to appeal from the January 31, 1992 decision of the trial court and stipulated that so much of their appeal as related to this Order was dismissed from the case. D.A. App. F. Thus, the question of whether the 1991 Board plan of apportionment was permissible is not at issue on this appeal nor in the related stay.

B. In Effectuating the Majority-Minority Practice in Ohio, the Defendants-Appellants Departed From this Court's Holding in *Gingles*

Two critical factual findings determined the outcome at the trial level. First, the trial court found that "legally signifi-

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[7] *Gingles*, 478 U.S. 30, 46 n.11 (1986).

[8] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964).

cant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice in *any* district other than the two districts (51 and 52) addressed by the court in *Armour*." D.A. App. D at 132a.[9] Secondly, the court found "[t]here is simply no proof to support a finding of the inability of black voters either to elect candidates of their choice or to affect the election of candidates of their choice in given legislative districts." *Id.*

The trial court held that if difficulty in electing candidates of choice and racial bloc voting are not proven then the basis upon which "a remedy" must be premised is missing. *Id.* In so ruling, the court followed the reasoning of *Gingles*, that where racial bloc voting did not exist or where blacks had been elected over a sustained period of time, there could be no violation of the Act. On this point *Gingles* stated:

> "In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.' Section 2(b)."

478 U.S. at 48 n.15.

The historical record of Ohio, unlike that of North Carolina in *Gingles*, showed that inter-racial coalitional voting, not racial bloc voting, had been the rule in the state. Each of the 11 black legislators presently serving in the Ohio General Assembly had been elected over a sustained period of time with a white crossover vote that was very substantial, usually more than 50%. D.A. App. D at 132-133a. The court cited with approval the opinion of Dr. Henderson, the

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[9] In *United States* v. *Marengo County Comm'rs*, 731 F.2d 1546 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984), the court held that proof of racially polarized voting is ordinarily the keystone of vote dilution claims.

Plaintiffs-Appellees' expert, who stated that the white crossover vote in these 11 minority districts was clear evidence of coalitional voting, *i.e.*, that a significant portion of white voters were repeatedly willing to vote for the candidate who was also the demonstrated choice of black voters. *Id.* at 133a n.2. "[T]he size of the white crossover vote provides one measure or criterion by which [one] may assess what the dividing line is between packing and not packing minority voting strength." *Id.* at 141a n.6 (citing Deposition of G. Henderson, p. 23). Here, the white and black coalitional voting was sufficiently great to provide very substantial and sustained pluralities for black legislators. To add black voters to the districts of these highly successful legislators simply wasted black votes in these districts and deprived blacks of the opportunity to elect or influence the election of a responsive legislator in adjoining districts.

The decision below held that the mere assumption of prior Voting Rights Act violations cannot be substituted for careful analysis by one who seeks to invoke the sweeping remedies made available by the Voting Rights Act. *Id.* at 130a-131a. However, to escape having to address either the controlling *Gingles* precedent or the disposition reached by the court below on the full factual record, the Defendants-Appellants would frame the issue here as a simple question of which party bears the burden of proof.[10] In doing so, however, Defendants-Appellants were forced to distort the panel's ruling beyond recognition. The court below did not make any erroneous ruling that a defending party must bear the burden of proof in a case brought under the Voting Rights Act. Instead, the court noted the plain fact, based on its own careful review of the factual record before it, that this reapportionment unnecessarily and unjustifiably concentrated black voters "into districts where they constitute an excessive majority" and further noted that this action can constitute an il-

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[10] Jur. State. p. 11.

legal dilution of racial minority group voting strength. D.A. App. A at 8a; *see Gingles*, 478 U.S. at 46 n.11.

Furthermore, the trial court specifically considered and rejected the argument presented here by Defendants-Appellants that its January 31, 1992 Opinion and Order held that an apportioning board must engage in a totality of circumstances analysis prior to any racially conscious redistricting to avoid the division of contiguous, cohesive concentrations of minorities. D.A. App. D at 130a-131a. It also rejected the Defendants-Appellants' argument that the court's holding was that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation unless it first analyzes the totality of circumstances. *Id.*

In rejecting these arguments, the trial court pointed to the factual circumstances of this case. The court stated that: it was "not faced with mere race-conscious redistricting that sought to avoid the division of contiguous cohesive concentration of minorities;" it was "not faced with a plan that simply created a substantial number of majority-minority districts without explanation;" and finally, it was "not faced with a state subject to Section 5 of the Voting Rights Act, in which case the historical violation of minority rights has been conclusively established." *Id.* at 131a. Instead, the court stated that it "addressed an apportionment board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based on Ohio policy and law; rather it contended that such a *per se* rule is mandated by federal law." *Id.*

The trial court stated, the wholesale creation of majority-minority districts on a statewide basis is a "remedy" which might be applied in appropriate circumstances. It is not a "right" which *must* be applied. *Id.* at 132a. To support such a remedy, the court said, a violation must be found. In the absence of such a violation, the trial court held that the Voting Rights Act may not be applied mechanistically to maximize the creation of majority-minority districts whenever possible. It held that no *per se* requirement for

majority-minority districts was mandated by the Act, by this Court's decisions, or by the decisions of the lower courts. *Id.* at 131a-132a. The trial court, citing *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 161 (1977), further stated that "[t]he implication [of *Carey*] is clear: the creation of majority-minority districts wherever possible is a remedy, not a right." *Id.* at 132a.

In summary, the Ohio Apportionment Board seeks to arrogate to itself the authority to create new federal law under a plan not justified either by federal law or by Ohio law. Tilling, the Board spokesman and architect of the flawed plan, admitted that he deliberately violated the Ohio Constitution in order to comply with his understanding of the Voting Rights Act.[11] Section 7(D) of Article XI of the Ohio Constitution requires the Board to adhere to existing legislative boundary lines except when it must depart to comply with the population requirements of Section 3 of Article XI.[12] Tilling testified that if there had been no Voting Rights Act requirement to create majority-minority districts, he understood that he would not have had to cross these Ohio political boundaries. D.A. App. D at 142-143a n.8 (citing Tilling II, p.

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[11] D.A. App. D at 142a-143a n.8, (citing deposition of James Tilling, dated Nov. 22, 1991, p. 49 [hereinafter Tilling II]).

[12] Ohio Const. art. XI, § 3 provides:

> "The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article."

Ohio Const. art. XI, § 7(D) provides:

> "In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article."

52). However, following his untutored and lay understanding of the concept of federal supremacy, Tilling drew the lines that he perceived were required by the Voting Rights Act even though this ignored Ohio constitutional provisions. *Id.* (citing Tilling II, pp. 51-52).

These Ohio constitutional provisions were enacted in 1971 specifically to prevent the pervasive political gerrymandering which their abandonment has now permitted. *See State ex rel. Herbert* v. *Bricker*, 139 Ohio St. 499, 509 (1942).[13] The Board ignored the Ohio Constitution, exempted itself from the necessity of providing a factual basis for its "remedy," and declined even to shoulder the threshold burden of showing the existence of racial bloc voting and the inability of black voters to elect representatives of their choice.

II. THE DEFENDANTS-APPELLANTS HAVE WAIVED ANY ARGUMENT THAT THEY SHOULD NOT HAVE THE BURDEN OF JUSTIFYING THEIR PLAN

The Defendants-Appellants voluntarily shouldered the burden to examine the "totalities of the circumstances" in the urban areas where they proposed to draw majority-minority districts. From the beginning of the process they consistently

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[13] In *Bricker*, the Ohio Supreme Court said:

> "The objective sought by the constitutional provisions was the prevention of gerrymandering. By creating a board of *ex officio* members and adopting self-acting provisions it was sought to place the function of apportionment in impartial hands and at the same time mark the way so that in the main at least the provisions of the Constitution would work automatically and the apportioning process ordinarily be a mere matter of calculation. *If the proper construction were that the districts fall apart at the end of each decennium, an entirely new adjustment would be necessary and the way for gerrymandering opened up.*"

139 Ohio St. at 509 (emphasis added).

argued to the trial court that their evidentiary submissions met the totalities test of the Voting Rights Act. When the trial court disagreed with their assessment of the proffered evidence, the Defendants-Appellants again voluntarily undertook to submit new evidence on February 19, 1992. They rejected out of hand any obligation to supply a factual basis for their "remedy" only after the trial court held on March 10, 1992, that "the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." D.A. App. C at 119a; Jur. State., p. 10. They exercised their choice to attempt to comply with the trial court's order on the merits of the case and allowed the 30-day appeal time to expire.

The Defendants-Appellants now seek to avoid the impact of their failure to appeal by arguing that the "whole case" is before the Court for review, citing *Fusari* v. *Steinberg*, 419 U.S. 379 (1974). The *Fusari* case is simply inapplicable here. In that case, the three-judge district court had held that an unemployment compensation statute of Connecticut was unconstitutional and after this Court noted probable jurisdiction, Connecticut significantly revised its unemployment statutes. *Id.* at 379-80. This Court determined that it was inappropriate to decide the issues tendered by the parties and remanded for reconsideration in light of intervening changes in Connecticut law. *Id.* at 390. No comparable circumstances are even arguably present in this case. Further, the issue in *Fusari* involved the failure to file a cross-appeal; here, there was no appeal whatsoever.

Faced by Plaintiffs-Appellees' motion to dismiss under Supreme Court Rule 18.5, filed March 19, 1992, Defendants-Appellants proposed that the parties stipulate that so much of the case as related to the January 31, 1991 decision of the trial court was not before the Supreme Court on appeal. Having voluntarily so stipulated, the Defendants-Appellants are bound by their sitpulation and may not unilaterally abandon it. They have not repudiated this stipulation and may not now avoid its impact.

Even assuming, *arguendo*, that in the absence of such a stipulation the "whole case," including the January 31, 1992 Order, was before this Court, the stipulation was a knowing waiver of any purported legal right they may have had to argue that point. The Defendants-Appellants entered into this stipulation to avoid a ruling by the trial court on a motion filed by Plaintiffs-Appellees to dismiss so much of the case as pertained to the trial court's January 31, 1992 Order because of the Defendants-Appellants' failure to appeal that Order. Rather than face the predictable outcome of that motion, they stipulated the result but now seek to escape the effects of their stipulation.

The Defendants-Appellants do not contend that they could have implemented the 1991 plan without violating the January 31, 1992 Order of the trial court; instead, they argue at length that the court erred on the merits of its holdings. Any fair reading of the trial court's January 31, 1992 Opinion and Order requires the conclusion that the trial court reached the merits of the Plaintiffs-Appellees' Voting Rights Act claim; no argument is presented to the contrary. Accordingly, a direct appeal to the Supreme Court was available but waived. *See*, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

III. THE EVIDENCE SHOWS THAT THE DEFENDANTS-APPELLANTS INTENTIONALLY PACKED AND FRAGMENTED BLACK VOTERS IN VIOLATION OF THE FIFTEENTH AMENDMENT

The Defendants-Appellants have urged this Court to note probable jurisdiction and reverse the trial court's evidentiary finding that the Board violated the Fifteenth Amendment to the United States Constitution. Jur. State., pp. 21-23. The thrust of their argument is: 1) that the plan was not drawn with a discriminatory motive against blacks, 2) that the dilutive effect of the plan was not known to the Board, and 3) that the persons who attempted to influence the Appellants to use the Voting Rights Act for partisan political advantage were not involved in drafting the plan itself. *Id.* at p. 22.

A central holding of the trial court was that in a state where coalitional voting was such that black candidates were repeatedly elected from districts with only 35% balck population, the *per se* requirement of the creation of majority-minority districts has a dilutive effect on black voters and this result was "exactly what the Defendants intended." D.A. App. D at 141a-142a. The court stated:

> "Indeed, the issue here is not whether the Board should be permitted to redress proven wrongs, but instead, whether the Board should be permitted to destroy what is right in Ohio — that is, coalitional voting. As shown by evidence introduced by both parties, the white crossover vote for black legislative candidates was very substantial, usually more than 50%. Such voting is not legally significant racial bloc voting, rather it is coalitional voting, and this coalition of black and white voters is the target of the Board's plan."

Id. at 132a-133a.

The trial court found the Defendants-Appellants' disclaimer of intent to be disingenuous. It stated,

> "[f]urthermore, the Board cannot seriously contend that it did not apply its 'remedy' intentionally and for a political advantage in violation of the Fifteenth Amendment. These facts establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. *See*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 681 (1991). It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim. (footnotes omitted)[14] *See*, *Armour* v. *Ohio*, 775 F. Supp. 1044, 1060-61."

Id. at 142-143a.

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[14] *Accord: Wright* v. *Rockefeller*, 376 U.S. 52, 66 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 (1960); *Ketchum* v. *Byrne*, 740 F.2d 1398,

The three elected Board officials here, Governor George Voinovich, Taft and Senator Stanley Aronoff, attempted to disavow any participation on their part in the drawing of the suspect districts by purporting to delegate their responsibility to Tilling.[15] Tilling is a professional politician who served as the chief of staff and Executive Director of the Republican Caucus, the director of the GOP caucus campaign committee, the chief fundraiser of the Ohio Republican Party, and the chief executive of the Republican-controlled Senate.[16] He acknowledged that he was fully familiar with the concept that by packing blacks the Republican Party could gain legislative seats.[17] Tilling and others discussed creation of majority-minority districts wherever possible as a winning strategy at meetings of the Republican National Committee. His files contained notes of such meetings in his own handwriting. He spoke at conferences of Republican officials on the Voting Rights Act on such issues as "building a file" to justify the Board's acts in the event of litigation. He conferred repeatedly with the chairman of the Ohio Republican Party, who urged that the Voting Rights Act be used as a device to obtain political advantage.[18] He also conferred repeatedly with Republican legislators concerning their preferences in the new districts.[19]

Tilling knew that black voters in Ohio voted 85-95% Democratic and that wherever blacks were 13% or more of

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1406-10 (7th Cir. 1984); *Buchanan v. City of Jackson*, 708 F.2d 1066, 1070-71 (6th Cir. 1983).

[15] Plaintiffs' Proposed Findings of Fact, Nos. 2-35 [hereinafter FOF] (Nos. 1-15, citing deposition of Stanley J. Aronoff, dated Nov. 27, 1991, pp. 10-11; Nos. 16-26, citing deposition of Robert A. Taft, dated Dec. 9, 1991, p. 8; Nos. 27-32, citing deposition of Governor George V. Voinovich, dated Dec. 16, 1991, p. 8; Nos. 33-35, citing deposition of James Tilling, Nov. 20, 1991, pp. 73-74, 96 [hereinafter Tilling I].

[16] FOF Nos. 364, 377 (citing Tilling II, pp. 36-37).

[17] FOF Nos. 86, 378 (citing Tilling II, pp. 63-65).

[18] FOF Nos. 381-383 (citing Tilling II, pp. 50-62).

[19] FOF Nos. 379, 384-386, 388-390 (citing Tilling II, pp. 10-11, 14-15, 19-21, 40-41).

the population, Democrats were inevitably elected.[20] He claimed that the apportioning process was not politically motivated, but he reduced the districts which had between 10-50% black population from 23 to 11, he increased the districts which had less than 8.5% black population by 9, he increased the districts with more than 50% black population by 5, he paired 20 of the 61 incumbent Democratic legislators with other Democrats, and he maneuvered the apportionment process so that there would be a shift of control in the House of Represenatives from Democrats to Republicans.[21]

Tilling discussed the matter of increasing majority-minority districts for the purpose of electing Republican legislators at panels of the reapportionment task force and panels sponsored by the National Republican Legislators Association and the Republican Legislative Leaders Association.[22]

In Tilling's files, produced in the course of discovery, Plaintiffs-Appellees uncovered a document entitled "Republican Opportunities," authored by David Horn, a friend and acquaintance of Mr. Tilling.[23] Horn delivered it to Joan Lawrence, a Republican legislator who in turn delivered it to Tilling.[24] "Republican Opportunities" is a strategic overview of the way in which Republicans might gain control of the Ohio General Assembly. It is explicit in its direction to "pack black minorities" in the major urban counties of Ohio.[25] It

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[20] FOF No. 378 (citing Tilling II, pp. 80-81).

[21] FOF Nos. 288-299, 391, 393 (citing deposition of Robert R. Dykes, dated Nov. 21, 1991, pp. 165-66, 171-72, 184, 192-93 [hereinafter Dykes I]; deposition of Robert R. Dykes, dated Dec. 12, 1991, pp. 9-21 [hereinafter Dykes II]; deposition of Robert Dykes, dated Dec. 13, 1991, p. 20; Tilling Depo., pp. 76-79, 206).

[22] FOF Nos. 86, 378 (citing Tilling II, pp. 63-65).

[23] FOF No. 359 (citing Tilling II, pp. 17-19).

[24] FOF Nos. 462, 465, 467, 469, 501, 510, 538, 545 (citing deposition of Joan Lawrence, Dec. 11, 1991, pp. 47-50, 53-54; deposition of David Horn, Dec. 10, 1991, pp. 11, 19, 82, 134).

[25] FOF Nos. 479, 502, 504-505, 511 (citing Lawrence, p. 109; Horn, pp. 12-13, 19).

recommended widespread pairing of Democratic incumbents and provided the names of likely candidates for such paring, who in fact were paired in the Board's plan struck by the court below.[26] Tilling read this document, maintained it in his files, and candidly admits that he would have presented it to the Apportionment Board majority but states that he did not do so because of "lack of time."[27]

Dr. Henderson, Plaintiffs-Appellees' expert, examined in detail the effects of the new boundaries in Hamilton County (Cincinnati), Franklin County (Columbus), Montgomery County (Dayton), and Lucas County (Toledo). He testified how in each precinct Tilling packed black voters beyond the numbers necessary to elect black representatives and deliberately fragmented those voters into Republican-dominated districts, where their vote would be diluted. Henderson considered the 1991 plan to be a roadmap to creating a racial gerrymander.[28]

The issue of where one starts in the process of drawing districts is critically important to the appropriate application of the Voting Rights Act. *See*, D.A. App. D at 121a-132a. When the Defendants-Appellants departed from a process approach to the application of the Voting Rights Act and instead looked to the effects they could achieve by *per se* application of majority-minority districting, they crossed over the line of intentional violation. The trial court emphasized this in its opinion:

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[26] FOF Nos. 517, 528, 533 (citing Horn, p. 38, 54, 60-61).

[27] FOF No. 359 (citing Tilling II, pp. 17-19). The author of Republican Opportunities also drafted a document entitled "Let's Pretend" which referred to Hamilton County, stating "[i]n this 'Republican' county the strategy is to 'pack' as much of the Democratic minority as possible into two heavily Democratic districts with black majorities." FOF No. 487 (citing Lawrence, p. 75. Mr. Horn's whole objective was to create what he called a Republican gerrymander. *Id.*; D.A. App. D at 143a n.9.

[28] FOF No. 426 (citing deposition of Gordon Henderson, Dec. 12, 1991, p. 57). The effect of this roadmap was to pair six Democratic legislators with 100% voting records in black influence districts, *i.e.* districts where black population was greater than 10%. FOF Nos. 322, 325, 337, 350 (citing Henderson, pp. 55, 64-65, 69, Ex. 17).

> "[T]he vital importance of following the proper process and avoiding the pitfalls of a *per se* application of majority-minority districting, the Board would arrogate to itself the unreviewable discretion to determine where and to what extent there existed dilution of minority voting strength. With such unchecked power to determine dilution an apportioning body acting cynically would be able to pack and fragment black voters at its political whim. Given the total absence of proof of legally significant racial bloc voting, the issue presented by the Board's argument is quite simple: whether an apportioning board should have unlimited discretion to apply the Voting Rights Act without a totalities analysis."

D.A. App. D at 139a-140a.

The Board could have followed the process of drawing a plan which complied with the anti-gerrymandering provisions of the Ohio Constitution. It could have then examined the districts which emerged from such a plan and made a preliminary inquiry as to whether racial bloc voting had historically been present and whether such bloc voting usually prevented blacks from electing a representative of their choice in these districts. Based on their preliminary analysis the Board could then have proceeded to determine whether potential Voting Rights Act violations were present. The time necessary to make these initial evaluations would have been minimal. Election results by district and legislative voting records of responsive and non-responsive legislators are readily available public records maintained by the Defendant-Appellant Taft and the Ohio Legislature.

Having conducted such a threshold examination, the Board could then have determined to what extent additional evidence was necessary to resolve any question of whether and to what extent the Voting Rights Act might be applicable.

Tilling, however, started with a different process. His first act was to examine the census of black population of each of the major urban areas in Ohio and to draw boundaries

around these black populations in the guise of following a "mandate."[29] This "mandate" was manufactured to avoid the obligation to make a particularized showing that a protected group had been denied the right to vote or that their right to vote had been canceled, minimized or diluted. Tilling achieved the politically desirable outcome by employing the "device" of assuming that mechanistically created *per se* black majority districts were required.

The trial court properly held that it was disingenuous for the Defendants-Appellants to argue that they did not know what they were doing, or that they had never conceived that the creation of majority-minority districts would destroy coalitional voting between blacks and whites, or that they were unaware that the packing and fragmenting would result in political advantage in light of the overwhelming factual record of this case. D.A. App. D at 133a-134a, 142a-143a.

IV. THE DEFENDANTS-APPELLANTS ARE IN EFFECT ARGUING FOR PROPORTIONAL REPRESENTATION, WHICH IS PROHIBITED UNDER SECTION 2(b) OF THE VOTING RIGHTS ACT

Assuming, *arguendo*, that the Defendants-Appellants' actions are, as they assert, entirely without political motivation, the rationale for their acts then appears to be that they are committed to a plan which seeks to guarantee proportional representation of black voters. Despite the absence of a record of legally significant racial bloc voting, the Board has insisted that there must be black populations in the reconfigured districts sufficient to "guarantee" the election of any black candidate, including non-incumbent black candidates. The Board justifies its boundaries on the grounds that it is creating "safe" black seats.[30]

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[29] FOF Nos. 92, 98 (citing Tilling I, pp. 61-62, 97).

[30] For example, Board Finding No. 183 states "[s]ince [minority] Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 to increase the relative percentage of black popula-

This Court has stated in *Gingles* that the issue in Voting Rights cases is not guaranteeing the election of black candidates. "Under Section 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate that is important." 478 U.S. at 68. A majority of the panel in *Armour* v. *Ohio*, 775 F. Supp. 1044, 1059 (N.D. Ohio 1991), stated, "the issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a *candidate of their choice*."

The trial court dealt with the argument that the Board was attempting to guarantee safe seats, stating:

> "It is no defense to say that the concentration and dispersal of black voters is being done on a benevolent basis to guarantee the election of black candidates as the Board would argue. The Board's argument is nothing less than an argument for proportional representation. Section 2 of the Voting Rights Act makes it clear that, the totality of circumstances aside, nothing in that section 'establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' "[31]

D.A. App. D at 142a.

Implicit in the "guarantee" of "safe" black seats is the premise that proportional repesentation is mandated. While

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tion in that district in order to provide an opportunity for a new black candidate without benefit of incumbency, to be elected in the district." D.A. App. H at 235a-236a. Similarly, Board Finding No. 187, *id.* at 236a, states that in increasing the black population in minority Representative Rankin's district, the rationale was that Rankin may not be a representative there through the year 2000; hence increasing black population in her district gives "an opportunity for the next generation of blacks who want to seek office in the Ohio legislature." Board Finding No. 186, *id.* at 238a. Both of these Findings ignore that one, equally logical, consequence of years of successful black-white coalitional voting of the type noted by the court below is a decreasing need to focus on the likelihood of future racial bloc voting.

[31] The court's Opinion noted that in Ohio, proportional representation would be a step backward for African-Americans. D.A. App. D at 142a.

in certain circumstances, *i.e.*, jurisdictions subject to Section 5 of the Voting Rights Act, or where Section 2 violations have been found, it may be entirely appropriate or necessary to configure districts which would more nearly assure the election of black candidates, this is not a mandate which has been applied generally to non-Section 5 states. The Defendants-Appellants' argument that mandatory proportional representation must be the goal flies in the face of the clear caveat of Section 2 of the Voting Rights Act "that nothing in this section can be construed to establish a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). While the Congress remains free to expand the scope of Section 5's reach, that is not a matter made discretionary in the federal court nor committed to the whims of state officials.

V. THE CASES CITED BY DEFENDANTS-APPELANTS DO NOT SUPPORT THEIR ARGUMENTS THAT MAJORITY-MINORITY DISTRICTS ARE MANDATED

In their Jurisdictional Statement, the Defendants-Appellants make the sweeping statement that, "the district court's decision of January 31, 1992 is contrary to every decision relating to the creation of minority-controlled districts." Jur. State., p. 2. Aside from the point that the Defendants-Appellants have stipulated that they are not appealing from the district court's decision of January 31, 1992, their case citations are inapposite.

The issue here is not whether the creation of minority districts is necessary to correct well-established and adjudicated past discriminatory practices, or to protect minorities "from being repeatedly outvoted," *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 168 (1977), or whether that can be done at the expense of white voters. Jur. State., pp. 10-12. These issues were settled long ago. Instead, the issue here is whether the Voting Rights Act requires an extreme political segregation of minority voters in the absence of either proven vote dilution violations of the Voting Rights

Act or a factual record that would meet the *Gingles* analysis. The cases cited by Defendants-Appellants do not even remotely address this issue and in any event none of the lower court rulings could purport to overrule or depart from this Court's decision in *Gingles* on this point.

The Defendants-Appellants apparently concede that the trial court correctly distinguished the *Carey* case and *Beer* v. *United States*, 425 U.S. 130 (1976), by noting that these were Section 5 cases while the present case is a Section 2 case. However, they criticize the conclusion of the trial court that the principles of Section 5 cases should not automatically be applied in a Section 2 case, stating, "the applicability of these [Section 5] principles to Section 2 cases, in and of itself, presents a substantial question which should be addressed by this court." Jur. State., p. 13 n.11. The Defendants-Appellants ask nothing less than that the Court abandon its ruling in *Gingles* requiring a totalities showing in Section 2 cases.

The trial court observed that with respect to states subject to Section 5 there has been a prior legislative determination that the discriminatory voting practices of that state have been so substantial that future redistricting plans are automatically suspect. In those states, the inability of minorities to participate equally in election processes has already been proven. D.A. App. D at 136a.

Ohio is not a Section 5 state. However, taking at face value the Defendants-Appellants' argument that Section 5 measures must be applied statewide, the trial court stated:

> "If officials of the state of Ohio seriously wish to concede that they have, in the past, intentionally and purposefully discriminated against minorities statewide, and that theirs is a state with a legacy of legally significant racial bloc voting, then this Court would be required to conclude that Congress had erred in excluding Ohio from the list of states subject to [Section 5 of] the Voting Rights Act."

D.A. App. D at 132a.

If the argument of the Defendants-Appellants is accepted by this Court, the holding of *Gingles* that at-large elections are not violative of the Voting Rights Act must be overruled because no logical distinction can be drawn between legislative elections and other elections. If mandatory majority-minority legislative districts in a community are valid, it follows that judicial, city, or county commission districts in the same community are equally valid. The first step following the adoption of such a mandatory rule will necessarily be the drawing of judicial, city and county commission districts wherever these races have been conducted on an at-large basis and a sufficient black majority exists to elect one or more such officials in the at-large district.

Gingles required a majority-minority district as a precondition to granting relief because, in the absence of such a district, no objective bright line measure for determining whether an injury had occurred would exist, since historically in North Carolina blacks had not been elected in the localities in issue. In Ohio, however, the ability and future potential to elect black representatives has been historically demonstrated. Accordingly, there is no need in Ohio to adopt a hypothetical majority-minority standard because other objective standards exist. Where blacks are able to elect representatives of choice by comfortable majorities, an objective measure for formulaing a remedy against any discriminatory structure (including majority-minority districts) is already in place. When the Board deliberately adds black voters to meet a non-historical, hypothetical standard in localities where blacks have been elected with far fewer black voters than the new standard requires, the Board then engages in discriminatory packing, albeit with an assertedly "benign" purpose.

The cases cited by Defendants-Appellants serve to confirm, rather than undermine, the correctness of the decision below. The Minnesota ruling,[32] which is tangentially relevant at best because it does not contain any finding of a violation under

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[32] *Cotlow* v. *Growe*, No. C8-91-985, slip op. at 12 (Minn. Redistricting Panel Nov. 21, 1991) (D.A. App. J).

the Voting Rights Act, states that concentration of minority voters is justified where it can "increase the probability that members of the minority will be elected." D.A. App. J at 291a. Since the facts as found by the court below show that minority legislators are already being elected in Ohio with substantial crossover votes from the majority white population, no such packing of minority voters has been justfied here. No similar evidence of successful minority elections with the aid of substantial white crossover votes was before the Minnesota court.[33]

The trial court aptly distinguished *Garza*, 918 F.2d 763, stating, "[t]here, the trial court found and the court of appeals confirmed that intentional discrimination had been practiced for decades against the Hispanic minority." *Garza*, 918 F.2d at 771. The court found that since at least 1959 and continuing in 1965, 1971 and 1981, Hispanic voters had been deliberately fragmented to dilute the effect of their vote on

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[33] Similarly, in *Wilson* v. *Eu*, 823 P.2d 545 (Cal. Jan. 27, 1992), the special masters relied heavily on the three-prong *Gingles* analysis in drawing the redistricting plan, and emphasized their concern to avoid not only the "unnecessary fragmentation" of minority voters, but also the "over-concentration of such groups in a single district," both of which were recognized to run afoul of the Voting Rights Act. *Id.* at 550. Although the factual background and political history of California and Ohio obviously differ, the same understanding of controlling federal law is evident in both decisions.

The same is true of the Texas ruling cited by Defendants-Appellants. It also applied the "totality of the circumstances" test set forth in the *Gingles* decision, noting that the lower courts have readily applied this same test in litigation over single-member districts. *See Terrazas* v. *Slagle*, Nos. 91-425, 426 & 428, slip op. at 9 (W.D. Tex. Dec. 24, 1991).

The citation to *Hastert* v. *State Board of Elections*, 777 F. Supp. 634, 650-51 (N.D. Ill. 1991), and the conclusion of the trial court there that "[r]acial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act," was made in the context of the approval of a majority Hispanic district in light of the factual background that the Hispanic population had been judicially found to be the intentional victim of historic discrimination in the drawing of previous boundaries and because the community had been impermissibly fractured and its voting strength diluted. *Id.* at 650.

future elections and that despite this evidence, the apportioning body had refused to draw the necessary majority Hispanic district. *Id.* at 766, 769. Accordingly, the trial court properly concluded that: "[i]n *Garza*, not only was the totalities test satisfied, but the even stricter test of *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) — intentional discrimination — had also been met. *See*, *Garza*, 198 F.2d at 771." D.A. App. D at 138a.

Accordingly, *Garza* does not stand for the proposition that a Board must draw majority-minority districts wherever possible, in the absence of conclusive proof of a Voting Rights Act violation. Rather, *Garza* indicates that such a district will be drawn by the court only where there is proof of intentional discrimination extending over many years.

In *Chisom* v. *Roemer*, ____ U.S. ____, 111 S. Ct. 2354 (1991) this Court held that Section 2 governs judicial elections and stated that Section 2 plaintiffs must demonstrate that an electoral device diminishes both their opportunity to participate in the political process *and* their opportunity to elect candidates of their choice. 111 S. Ct. at 2365. The Defendants-Appellants offered no evidence because none is available that black voters had been unable to elect representatives of choice in specific districts. *Chisom*, like *Gingles*, focused primarily on the impact of electoral practices on the ability of minorities to *elect* representatives of their own choosing.

VI. FOURTEENTH AMENDMENT VIOLATION

The trial court found that both the 1991 and 1992 plans of the Board violated the Fourteenth Amendment because the Board, on two occasions, ignored this Court's 10% total population deviation standard without justifying such deviations by compelling legitimate state interests. *White* v. *Regester*, 412 U.S. 755, 772-73 (1973) (Brennan, J., dissenting) (stating the general rule that emerges from the majority's holding). Article XI, Section 3 of the Ohio Constitution provides for a plus or minus 5% deviation from the ideal

legislative district population, thus providing a districting criterion that allows a deviation total of 10%.[34]

The Board created single-member districts that departed from the 10% total deviation standard in Fairfield, Wayne and Ashtabula Counties and in Senate District 32. D.A. App. D at 146a-147a. If there is a conflict between respect for political boundaries and adherence to the population standard, this conflict must give way to the equal population standard in the absence of compelling state reasons. The Board offered no justification whatsoever for its violation of the 10% standard and accordingly violated the Fourteenth Amendment. *See, e.g., Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), *aff'd mem.*, ____ U.S. ____, 111 S. Ct. 662 (1991); see also, *Connor* v. *Finch*, 431 U.S. 407, 416-17 (1977).

CONCLUSION

For each of these reasons, Defendants-Appellants' appeal should be dismissed and the ruling of the trial court should be affirmed.

DATED: May 11, 1992

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[34] *Supra*, fn. 2, p. 4.

Supreme Court, U.S.
FILED
MAY 15 1992
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No. 91-1618 (A-693)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the
Ohio House of Representatives, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Ohio

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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QUESTIONS PRESENTED

Whether the district court erroneously held that state reapportionment officials must, as a prerequisite to redistricting, conduct a totality of circumstances analysis adopted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Whether the district court erroneously shifted the burden of proof from plaintiffs attacking legislative districts as diluting minority voting strength to defendant reapportionment officials by requiring them to prove a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, prior to the creation of any minority controlled state legislative districts.

Whether the district court's finding of a violation of § 2 of the Voting Rights Act is erroneous.

Whether the district court erroneously enjoined the primary election for members of the Ohio General Assembly and appointed a special master to redraw Ohio's state legislative districts without first affording defendants a reasonable opportunity to adopt substitute districts.

Whether the district court's finding of a violation of the Fifteenth Amendment is erroneous.

Whether the district court's finding of a violation of the Fourteenth Amendment is erroneous.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT MCLAUGHLIN, JAMES B. MCCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District, MARY ABEL, Representative of the 94th Ohio House District, and WILLIAM MALLORY, Representative of the 23rd Ohio House District.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1618 (A-693)

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Appellants,

v.

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Ohio House of Representatives, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Ohio

---

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. INTRODUCTION

Appellants submit the following response to *Appellees' Motion to Dismiss Appeal and to Affirm Ruling of Trial Court* (hereinafter "*Appellees' Motion to Dismiss or Affirm*").

II. THE DISTRICT COURT ERRONEOUSLY REQUIRED DEFENDANTS TO PROVE A PAST VIOLATION OF § 2 OF THE VOTING RIGHTS ACT PRIOR TO THEIR CREATION OF MINORITY CONTROLLED DISTRICTS UNDER THE 1991 PLAN OF APPORTIONMENT, THUS SHIFTING THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS

In their Motion to Dismiss or Affirm, Appellees once again mischaracterize the action of the majority of the

Apportionment Board in adopting the 1991 plan of apportionment.[1] Appellees continually refer to Appellants' plan as "creating majority-minority districts wherever possible." The district court adopted this mischaracterization and Appellants must, therefore, emphasize that the strategy used by the Apportionment Board in drafting the plan was not one of maximizing minority voting strength.

Appellees accomplish this mischaracterization by referring to isolated quotes taken out of context wherein Appellant Tilling, Secretary to the Apportioning Persons, is explaining the process of drawing legislative districts to members of the public. *Appellees Motion to Dismiss or Affirm* at 8. In truth, however, the position consistently taken by Appellants throughout the process of drafting the plan has been that § 2 of the Voting Rights Act, 42 U.S.C. § 1973, simply requires state redistricting officials to avoid the dilution of minority voting strength. *Findings and Conclusions*, App. at 270a (Ohio Apportionment Board Feb. 18, 1992). It neither requires the creation of minority controlled districts nor prohibits their creation. If, however, the apportioning officials avoided fragmenting any sufficiently large and geographically compact

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[1] Appellees attempt to rehash their failed arguments from the proceedings below by asserting that the plan is fraught with violations of the Ohio Constitution. *Appellees' Motion to Dismiss or Affirm* at 14-15. Appellants direct this Court's attention to the Ohio Supreme Court's decision in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992), wherein the court held "the plan to be constitutional." 63 Ohio St.3d at 200. That court directed Appellants to make technical corrections to the plan, which corrections were adopted by the Board on February 18, 1992 (the 1991 plan of apportionment, as amended on February 18, 1992, will hereinafter be referred to as the "1991 plan of apportionment"). The district court in the case at bar found no violations of the Ohio Constitution, and indeed abstained from any consideration of the state issues raised by Appellees. *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 15a (N.D.Ohio Jan. 31, 1992). Consequently, Appellees' assertion that Appellants somehow "used" the Voting Rights Act to shield their alleged violations of the Ohio Constitution must be rejected in the absence of any finding of a violation of the Ohio Constitution.

concentration of minority population, they could avoid a successful § 2 challenge.

Indeed, were Appellants to have taken the view that the Voting Rights Act required the *maximization* of minority voting strength, they would, as noted by Judge Dowd in his dissenting opinion of January 31, 1992, have drawn districts with the lowest percentage of black population necessary to elect a black member of the Ohio House of Representatives. *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 35a (N.D.Ohio Jan. 31, 1992) (Dowd, J., dissenting). Under the majority opinion, minorities are *per se* "packed" into a minority controlled legislative district where it would be possible to elect a minority candidate with less than a majority of minority population in that district. Accordingly, it is the district court's decsion, not the process of drafting the 1991 plan of apportionment, which would require the maximization of minority voting strength.

From the outset of the reapportionment process, which began nearly one year prior to the adoption of the plan in October 1991, Tilling worked closely with minority leaders throughout the state to achieve a consensus on the configuration of house and senate districts in Ohio's urban counties. *Findings and Conclusions*, App. at 269a-270a (Ohio Apportionment Board Feb. 18, 1992). Indeed, in an effort to open up the reapportionment process, the Board, in the two months prior to the adoption of a plan, held an unprecedented series of public hearings throughout the state to receive public input on the drafting of the new plan. *Findings and Conclusions*, App. at 163a (Ohio Apportionment Board Feb. 18, 1992). Tilling worked closely with Floyd Johnson of the Ohio NAACP, which also submitted a proposed plan of apportionment limited to the urban counties. Indeed, as conveniently ignored by Appellees and the majority of the district court, Tilling incorporated the NAACP's plan in its entirety into the plan of apportionment originally submitted

to the Board. The only changes in that plan, other than the technical corrections made on February 18, 1992, were in Cuyahoga County and were the result of negotiations with the NAACP and other minority groups.

With this background in mind, it is significant that this case was not commenced and maintained out of concern for the rights of minority voters in Ohio. Indeed, as noted above, the plan adopted was configured in accordance with negotiations with groups representing minority voters. Rather, as revealed in *Appellees' Motion to Dismiss or Affirm*, this case was commenced to preserve the lopsided majority incumbent white Democrats now hold in the Ohio House of Representatives. See *Appellees' Motion to Dismiss or Affirm* at 19-20 ("Tilling knew that black voters in Ohio voted 85-95% Democratic and that wherever blacks were 13% or more of the population, Democrats were inevitably elected.").[2] Floyd Johnson of the Ohio NAACP decried this "use" of black voters to bolster the incumbencies of white Democrats as "plantation politics" which could no longer be tolerated. *Transcript of Apportionment Board Hearing* at 62 (February 11, 1992).

Furthermore, contrary to Appellees' assertion, the primary flaw in the district court's decision is that it shifted the burden of proof because, instead of requiring the plaintiffs to show that the minority controlled districts created by the Board diluted minority voting strength in violation of the Voting Rights Act, it required the Board to "justify" its creation of those districts. Although Appellees attempt to minimize this shifting of the burden of proof, its significance is manifested throughout *Appellees Motion to Dismiss or Affirm*. See, e.g., *Appellees' Motion to Dismiss or Affirm* at 9 ("The court found the evidence *supplied by the Defendants-Appellants* to show

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[2] Appellees presented a claim of political gerrymandering to the district court, which did not find that Appellees had established such a claim.

violations under the 1981 plan to be 'grossly inadequate' ") (emphasis added).

Finally, Appellees argue that Appellants, because they chose not to appeal from the district court's January 31, 1992 Opinion and Order, are barred from challenging the legal conclusions therein. This argument is completely without merit.

Initially, Appellants note that the district court's erroneous legal conclusions of January 31, 1992 were reiterated in the March 19, 1992 Order from which a separate Notice of Appeal was filed. Consequently, Appellants may properly challenge those conclusions.

Moreover, 28 U.S.C. § 1253 provides only for an appeal to this Court from an order "granting or denying . . . an interlocutory or permanent injunction . . . ." The January 31, 1992 Opinion and Order did not declare invalid or enjoin the 1991 plan of apportionment. Rather, the district court simply directed the Apportionment Board to "justfy" the creation of minority controlled districts and to submit a complete factual record to the court. *At most*, the January 31, 1992 Opinion and Order was a grant of an interlocutory injunction, and may not have been appealable at all.

It is fundamental that an appeal from a three-judge federal court, pursuant to 28 U.S.C. § 1253, brings the entire case before this Court. *Fusari v. Steinberg*, 419 U.S. 379, 387 n.13 (1975). See also *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*, 446 U.S. 719, 737 n.16 (1980). In *White v. Regester*, 412 U.S. 755 (1973), a three-judge district court declared the state's plan for the Texas House of Representatives unconstitutional, but permitted the 1972 election to go forward under the state's plan except for two counties. With regard to these two counties, the district court entered an injunction requiring multi-member districts to be reconstituted into single-member districts for the 1972 election. The state defendants appealed to this Court pur-

suant to 28 U.S.C. § 1253, and challenged both the injunction and the declaration that the entire plan was invalid. This Court summarily disposed of the ensuing jurisdictional challenge by holding that the appeal from the injunction, under 28 U.S.C. § 1253, also entitled the appellants to a review of the district court's accompanying declaration that the plan was invalid statewide. 412 U.S. at 761-762.

Furthermore, the language of 28 U.S.C. § 1253 clearly provides for a *permissive appeal* from an interlocutory injunction granted by a three-judge federal district court. Contrary to Appellee's unsupported assertion that Appellants have waived the right to challenge any portion of the January 31, 1992 Opinion and Order, it is an elementary principle of federal civil procedure that where an appeal from an interlocutory order is permissive and no appeal is taken, the interlocutory order merges into the final decree and an appeal from the final judgment brings up for review all antecedent interlocutory orders. *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 469 (9th Cir. 1989). See also *Arthur v. Nyquist*, 547 F.2d 7, 9 (2d Cir. 1976); *Yamamoto v. Omiya*, 564 F.2d 1319, 1325 n.11 (9th Cir. 1977); *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989).[3]

In the present case, the district court's January 31, 1992 Opinion and Order was clearly interlocutory in nature because it did not finally rule upon the merits of any of Appellees' claims. Appellants were simply directed to "justify" their plan. Failure to appeal from this inter-

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[3] Even a cursory reading of the March 19, 1992 *Stipulation*, App. at 153a, belies Appellees' assertion that Appellants stipulated "that so much of the case as related to the January 31, 1991 decision of the trial court was not before the Supreme Court on appeal." *Appellees' Motion to Dismiss or Affirm* at 16. Rather, it is clear that Appellants simply stipulated to the dismissal of the appeal from that order. Appellants have consistently taken the position that the *issues* related to the district court's January 31, 1992 Opinion and Order are not waived.

locutory order does not, therefore, prohibit Appellants from challenging its conclusions in this appeal.

III. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED, UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, TO JUSTIFY THEIR CREATION OF MAJORITY-MINORITY DISTRICTS IN THE 1991 PLAN OF APPORTIONMENT

Even if Appellants were required to "justify" their creation of minority controlled districts under this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), Appellees incorrectly assert that they failed to do so. Appellees argue that Appellants failed to establish the presence of significant racial bloc voting (or to even conduct a bivariate ecological regression analysis) and the inability of minority candidates to be elected. This is simply inaccurate.[4]

Dr. Gary King, Professor of Government at Harvard University, Director of the Harvard Data Center, and a nationally recognized expert in the field, conducted a bivariate ecological regression analysis and testified as to the presence of legally significant racial bloc voting before the district court on December 17, 1991. He repeated that testimony, and in fact expanded it to include an analysis of the advantage of running as an incumbent, at the Apportionment Board hearings on February 11 and 18, 1992. The Board relied upon Dr. King's credible testimony when it found the existence of racial bloc voting. See *Findings and Conclusions*, App. at 191a-194a, 205a-

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[4] Prior to the district court's Opinion and Order of January 31, 1992, Tilling informally concluded that such analysis supported the creation of minority controlled districts in Ohio. He reached this conclusion based upon his own extensive personal experience in Ohio politics, the testimony presented at the fifteen public hearings throughout the state, and his comprehensive discussions with minority leaders throughout the reapportionment process. Contrary to the district court's conclusion of January 31, 1992, such lay and non-expert testimony is sufficient to support the creation of minority controlled districts. *Hall v. Holder*, 955 F.2d 1563, 1570-71 (11th Cir. 1992).

206a, 222a-230a (Ohio Apportionment Board Feb. 18, 1992). Thus, contrary to Appellees' assertion, there was ample evidence of racial bloc voting supporting the creation of minority controlled districts under the 1991 plan of apportionment.

Furthermore, Appellants did not draw minority controlled districts by completely disregarding the success of some minority legislative candidates in Ohio.[5] Rather, Appellants drew legislative districts without regard to particular legislators' status as incumbents and fully cognizant of the fact that minorities running to succeed current incumbent legislators would not have the advantage of running as incumbents. *Findings and Conclusions*, App. at 227a-228a (Ohio Apportionment Board Feb. 18, 1992). Consequently, the Appellees' assertion, as well as the district court's holding, that Appellants failed to "justify" their creation of minority controlled districts is simply without merit.

IV. A DISTRICT COURT MAY NOT APPOINT A SPECIAL MASTER TO REDRAW STATE LEGISLATIVE DISTRICTS WITHOUT FIRST AFFORDING THE STATE'S APPORTIONING OFFICIALS A REASONABLE OPPORTUNITY TO ADOPT A SUBSTITUTE PLAN

Appellees did not discuss this issue in their *Motion to Dismiss or Affirm* and accordngly, no response is required.

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[5] Appellees incorrectly advise the Court that "[u]nder the 1981 apportionment plan, the black population in the black legislators' districts ranged from 38.5% to 53.19% . . . ." *Appellees' Motion to Dismiss or Affirm* at 9. Indeed, three African-American legislators, Representatives James, Prentiss, and Whalen, were elected from districts under the 1981 plan which had black populations of 74.8%, 90.1%, and 94.6% respectively. *Quilter v. Voinovich*, No. 5:91CV-2219, App. at 96a, 115a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 177a, 187a, 222a, 226a, 261a, 265a (Ohio Apportionment Board Feb. 18, 1992). Failure to reduce the relative black populations in these districts would most likely have resulted in a legal challenge to these districts as "packing" minority voters in violation of § 2 of the Voting Rights Act.

V. THE DISTRICT COURT'S HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS ERRONEOUS AND MUST BE REVERSED

As previously noted, there is a complete absence of facts supporting the district court's finding that the 1991 plan of apportionment violated the Fifteenth Amendment to the United States Constitution. Indeed, the only citation to "facts" contained in Appellees' *Motion to Dismiss or Affirm* is to *Plaintiffs' Proposed Findings of Fact*,—findings that were never adopted by the district court. See *Appellees' Motion to Dismiss or Affirm* at nn. 15-29.

From these misleading citations to *proposed* findings, Appellees suggest that Tilling drew minority controlled districts as part of a scheme to construct a "racial gerrymander." This is simply incorrect. Although Tilling had been urged by persons not involved in drafting the apportionment plan to use the requirements of the Voting Rights Act for partisan political advantage, the uncontroverted testimony was that Appellants were not influenced by these attempts. *Deposition of James R. Tilling* at 81 (November 22, 1991). Indeed, Dr. King testified that the 1991 plan of apportionment was statistically biased in favor of neither party. *Findings and Conclusions*, App. at 252a-254a (Ohio Apportionment Board Feb. 18, 1992).

As previously noted, it is inconceivable that Appellants adopted the 1991 plan of apportionment with the intent of discriminating against minorities when the plan adopted for Ohio's urban counties was the result of extensive consultation and negotiations with the minority community and was, prior to the negotiations concerning Cuyahoga County and the February 18, 1992 technical amendments, identical to that submitted by the Ohio NAACP. Accordingly, the district court's finding of a Fifteenth Amendment violation cannot stand.

VI. THE DISTRICT COURT'S FINDING OF A VIOLATION OF THE FOURTEENTH AMENDMENT IS ERRONEOUS AND MUST BE REVERSED

Appellees repeat the district court's error of assuming a violation of the Fourteenth Amendment simply because the districts were not within plus or minus 5% of the ideal population. Like the district court, Appellees offer no analysis of the total deviation in excess of 10% as required by this Court in *Mahan v. Howell*, 410 U.S. 315 (1973), and *Connor v. Finch*, 431 U.S. 407 (1977). Such analysis would have revealed that Ohio's longstanding policy of respecting political subdivision boundaries where reasonably possible justified the total deviation of only 13.81% in the 1991 plan of apportionment.[6] Accordingly, the district court's finding of a violation of the Fourteenth Amendment must be reversed.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court to deny Appellees' Motion to Dismiss Appeal and to Affirm Ruling of Trial Court, and to note probable jurisdiction in this appeal.

Respectfully submitted,

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DATED: May 15, 1992

[6] Indeed, the Ohio Supreme Court's technical amendments to the 1991 plan of apportionment were mostly directed to reuniting political subdivisions which had erroneously been split between two districts.

JOINT

APPENDIX

Supreme Court, U.S.
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JOINT APPENDIX

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
(Akron)

No. 5:91-CV-2219

QUILTER, *et al.*

v.

VOINOVICH, *et al.*

RELEVANT DOCKET ENTRIES

Date		PROCEEDINGS
11/1/91	1	COMPLAINT (Summons(es), magistrate consent form issued) (24 pgs) (jr)
		* * * *
11/5/91	5	MOTION by Richard Cordray, Paul Mechling, Ronald Gerberry, Mary Abel to intervene as pltfs (4+exh pgs) (jr)
		* * * *
11/7/91	7	ORDER: Case assigned to panel of Judge Alvin I. Krenzler and Judge Nathanial R. Jones and Senior Judge John W. Peck to hear & determine this procdg (issued on 11/7/91) (lp) (jr)
		* * * *
11/8/91	12	ORDER: denying motion for temporary restraining order until further of of the Ct [6-1] denying motion for preliminary injunction until further ord of the Ct [6-2] granting motion to intervene as pltfs [5-1] Paul Mechling, Mary Ronald Gerberry, Richard

Date		PROCEEDINGS
		Cordray (issued on 11/8/91) (3 pgs) Judge Nathaniel R. Jones, Circuit Judge & John W. Senior Circuit Judge (jr) [Entry date 11/14/91] [Edit date 11/14/91]
11/8/91	16	INTERVENOR'S COMPLAINT by intervenor-plaintiffs' (20 pgs) (jr) [Entry date 11/14/91]
		* * * *
11/14/91	13	ORDER: sched trial on the merits for 10:00 a.m. on 12/3/91 in the 4th floor Courtromm of the U.S. Courthous, Cincinnati (issued on 11/14/91 (2 pgs) Circuit Judge Nathaniel R. Jones, Senior Circuit Judge John W. Pecki, Judge Alvin I. Krenzler (jr)
		* * * *
11/14/91	15	ANSWER to Complaint by defts' (18 pgs) (jr)
11/14/91	17	ANSWER to intervenors Complaint by defendant George V Voinovich, defendant Stanley J Aronoff, defendant Robert A Taft II, defendant James R Tilling (16+exh pgs) (jr)
11/14/91	18	REPORT on stat conf: Purpose of stat conf was to discuss with cnsl the various iss in the case which were major litigation, issues raised by the pldgs, issues to be tried, stips, disc, ref to Master or Mag. Judge, abstention, length of tr, expert witnesses, rule 23 class certification, tr or hrg date of 12/3/91 & the best manner of procdg. (issued on 11/15/91) (4 pgs) Judge Alvin I. Krenzler (jr) [Entry date 11/15/91]
		* * * *

Date		PROCEEDINGS
11/18/91	26	ORDER: Purs to Administrative Ord No. 141 this case is transferred to Judge David D. Dowd Jr. (issued 11/18/91 (1 p) (Judge Alvin I. Krenzler & Chief Judge Thomas D. Lambros (jr)
		* * * *
11/25/91	31	ORDER: That Judge David D. Dowd replace Judge Alvin I. Krenzler as a member of the three-judge panel—in view of the fact that Judge Krenzler has withdrawn from the panel. (Chief Judge Merritt-U.S.C.A. 6th Circuit) (1 pgs) (fax copy) (md) [Edit date 11/25/91]
		* * * *
12/3/91	46	MINUTES of proceedings before Judge David D. Dowd Jr., U.S. District Judge; Judge John W. Peck, U.S. Circuit Judge; Judge Nathaniel R. Jones, U.S. Circuit Judge. Court reporter Zengler. Trial began. Opening statements. Motion for order to abstain from resolving OH Constitutional iss [34-1] denied; Motion for leave to file its first ams complt to add named pla William L. Mallory [27-1] granted; Motion to certify—ruling reserved [34-2]; Motion for protective order moot; Dates to resp to mots of disc reserved until further ord of the Court. Cont to 12/17/91 at 9:00 a.m. Time: '5 hrs. (1 pgs) (jp) [Entry date 12/05/91]
12/5/91	47	AMENDED COMPLAINT by plaintiff [1-1]; adding William L Mallory as pla (26 pgs) (jp)
		* * * *

Date		PROCEEDINGS
12 16 91	99	ORDER denying motion to continue tr [95-1]. FURTHER the Court will consider the concerns expressed by dfts in the mot for cont at the conclusion of the hrg sched for 12/17/91 (issued on 12/16/91) (1 pgs) Judge David D. Dowd Jr. (jp)
		* * * *
12/18 91	118	MINUTES of proceedings before Judge David D. Dowd Jr., US Dist Judge; Judge Nathaniel Jones, US Circuit Judge; Judge John Peck, US Circuit Judge. Court reporter Joan Zengler. Continuation trial held on 12/17/91. Presentation of plas. Opening statement of Thomas Atkin & Armistead Gilliam. Presentation of dfts—Orla Collier. Findings of fact due 12/30/91. Iss briefed by 1/6/92. Time: 7 hrs. (2 pgs) (jp) [Edit date 12/18/91]
		* * * *
12/24/91	132	ORDER denying plas' motion to stay state court procdgs [97-1] (issued on 12/24/91) (2 pgs) Judge David D. Dowd Jr. (jp) [Entry date 12/26/91]
		* * * *
1/31/92	145	OPINION & ORDER that the Board is ord to reconsider the Plan (faxed 1/31/92) (issued on 2/3/92) (53 pgs) Circuit Judge Nathaniel Jones, Senior Circuit Judge John Peck, joined; Judge David D. Dowd Jr., dissented (jp) [Entry date 02/03/92]
2/3/92	146	ORDER The majority opinion and the dissesnt were filed 1/31/92. The dissent made ref to Appendix 2. However, Appendix 2 was still undergoing final review. Appendix 2 is now complete and the Clerk is directed to file the same and to forward copies to counsel of record and to Judge Jones and Judge Peck (issued on 2/3/92) (76 pgs) Judge David D. Dowd Jr. (pma)

Date		PROCEEDINGS
2/19/92	147	NOTICE by defendants of filing record (3 pgs) (Attached to notice are: Exh A—Findings & Conclusions of the Board dated 2/18/92; Exh B—Transc of Board Hrg of 2/11/92; Exh C—Transc of Board Hrg of 2/18/92) (jp) [Edit date 02/19/92]
		* * * *
2/26/92	156	ORDER granting plas lv until 11:00 a.m. on 3/6/92 to file a memo in resp to the 2/19/92 filing of dfts, FURTHER that a copy of the plas' memo be delivered to the chambers of each of the three judges on this panel by noon on 3/6/92, FURTHER upon recpt of the plas' resp, the Court will consider this case at iss, FURTHER it is the present view of this Court that an addl hrg, as req by plas, will srv no useful purpose, FURTHER Clerk to fax a copy of this ord to counsel of record. (issued on 2/26/92) (2 pgs) Judge David D. Dowd Jr. (jp)
		* * * *
3/5/92	159	ORDER granting dfts' motion for leave to file brf in resp to memo that plas have until 3/6/92 to file [158-1], FURTHER dfts granted lv to file a memo in opp to plas' memo providing same is filed w/Clerks Office in Akron by 3:00 p.m. on 3/9/92 & copies of memo are to be delivered to chambers of each of the three judges on the panel by 4:00 p.m. on 3/9/92. (issued on 3/5/92) (1 pgs) Judge David D. Dowd Jr. (jp)
		* * * *
3/10/92	163	ORDER re apportionment plan & appt Special Master. (faxed on 3/10/92 & mailed on 3/11/92) (9 pgs) Senior Circuit Judge John W. Peck, Circuit Judge Nathaniel R. Jones; Dissenting, Judge David D. Dowd Jr. (jp) [Entry date 03/11/92]

Date		PROCEEDINGS
3/11/92	164	NOTICE of appeal by dfts George V Voinovich, Stanley J Aronoff, Robert A Taft II, & James R Tilling re orders [163-1], [145-1] (cc: all counsel and the Supreme Court of the US on 3/13/92) fee paid (2 pgs) (fm) [Entry date 03/13/92]
		* * * *
3/16/92	169	ORDER & subp to produce software & data files to Special Master (see ord for details). (issued on 3/16/92) (faxed 3/16/92) Judge John W. Peck (4 pgs) (jp) [Entry date 03/17/92]
		* * * *
3/19/92	173	FINDINGS of fact, suppl memo of law & order. (faxed to counsel on 3/19/92) Nathaniel R. Jones, Circuit Judge; John W. Peck, Senior Circuit Judge (19 pgs) (jp) [Entry date 03/20/92]
3/25/92	174	NOTICE of appeal by dfts George V Voinovich, Stanley J Aronoff, Robert A Taft II, & James R Tilling re findings of fact [173-1] (cc: all counsel and the Supreme Court of the US notified on 3/27/92) fee status paid (2 pgs) (fm) [Entry date 03/27/92] [Edit date 03/27/92]
		* * * *
3/31/92	176	ORDER that said primary election is hereby resched to be held 9/8/92, FURTHER that the Secy of the State of OH be & he hereby is enjoined to do all such acts as may be necessary for the holding of such primary election 9/8/92. (issued on 3/31/92) (1 pgs) Judge Nathaniel R. Jones; Senior Judge John W. Peck (jp)

Date		PROCEEDINGS
4/1/92	178	NOTICE of appeal by dfts George V Voinovich, Stanley J Aronoff, Robert A Taft II, & James R Tilling re order [176-1] (cc: all counsel and the Supreme Court of the U.S. on 4/3/92) fee status paid (2 pgs) (fm) [Entry date 04/03/92]
		* * * *
4/3/92	177	STIPULATION and ORDER upon agreement of ptys that portion of the appeal to the US Supreme Court from the 1/31/92 ord of the Dist Ct shall be dism, FURTHER this stip does not affect the appeal from the 3/10/92 ord. (issued on 4/3/92) (2 pgs) Judge David D. Dowd Jr (jp)
		* * * *
4/24/92	183	STATUS Report by special master Lawrence A Kane & req for instructions (3 pgs) (jp)
		* * * *
4/28/92	187	INSTRUCTIONS to the Special Master re stat rpt. (issued on 4/28/92) (3 pgs) Judge Nathaniel R. Jones; Judge John W. Peck (jp)
		* * * *
4/30/92	189	ORDER granting plas' motion for stat conf [181-1], FURTHER counsel for ptys are to appear on 5/4/92 at 2:00 p.m. in the United States Courthouse in Cincinnati, FURTHER denying plas' motion for stay pending stat conf result [188-1] (faxed on 4/30/92) (issued on 5/1/92) (5 pgs) Judge Nathaniel R. Jones; Judge John W. Peck (jp) [Entry date 05/01/92]
		* * * *

Date		PROCEEDINGS
5/5/92	191	ORDER directing Clerk to docket the two exhs offered by dfts at the 5/4/92 hrg: 13 pg docmt entitled "Technical Amendments to the Ohio 1991 Plan of Apportionment" & the 5/4/92 affvt of John F. Bender, Chief Elections Counsel for the OH Secy of State Bob Taft. (issued on 5/6/92) (1 pg) Judge David D. Dowd Jr. (jp) [Entry date 05/06/92]
		* * * *
5/5/92	194	OPINION AND ORDER directing Secy of State to accept new candidate filings in any Ohio House or Senate district reconfigured by the 2/18/92 amendments, FURTHER the filing deadline is 5/8/92 at 4:00 p.m., FURTHER the Secy of State is empowered to take all actions, notwithstanding any state election law or time period to the contrary, to assure that any candidates filing under this court-ord grace period are included in the 6/2/92 primary election. Judge Nathaniel R. Jones; Judge John W. Peck; DISSENTING, with the concern that potential candidates for the OH General Assembly were not given a fair opportunity to declare for the office, either as a candidate for the House of Representatives or as a candidate for the Senate, because the 1991 Plan as revised was not adopted until 2/18/92 & the deadline for filing was a scant two days later. [166-1] Judge David D. Dowd, Jr. (faxed on 5/5/92) (issued on 5/6/92) (18 pgs) (jp) [Entry date 05/06/92]
		* * * *

DEPOSITION OF JAMES R. TILLING
(November 20, 1991)
[Docket #102]

[32] Q. Can you be more precise than the month?

A. I would like to be, but no. I mean basically the entire work of drawing this map commenced in the latter part of August and went through October 1st.

Q. Did you do correlation and regression analysis?

A. No, we did not.

Q. Why not?

A. Mainly because of time. As I have indicated, we have a very time-consuming process simply to obtain [33] the data that we needed to do it. And prior to the 1990 census, 1980 information, there was no computer method available for matching census geography with election data.

And, you know, we got a late start on this process because the Census Bureau didn't decide until July 15th of 1991 whether or not it was going to use adjusted data. And that and difficulty of preparing a unified data base meant that we did not have data to begin this process until the end of August of this year, which gave us a very compressed time frame to work in.

* * * *

[35] Q. Let me see what you have got in your computer now. You have got elections on a statewide basis?

A. Correct.

Q. Do you have them on a legislative district basis?

A. They can be aggregated that way, right.

Q. And you have that going back to—

A. To 1982.

* * * *

[37] Q. Let's try it again. Start with the premise that we have 1981 boundaries and 1991 boundaries.

A. You are asking me if we did an analysis of racial voting for the state legislative districts. The answer is yes, we did.

Q. You did.

A. Yes.

Q. You did—where did you do it? Did you do legislative districts, for example, in Cleveland?

A. Yes. We did basically, we looked at the votes for minority representatives to the General Assembly to see, you know, what we could tell about racial patterns of voting. For example, in Columbus—as Bob knows it's a little difficult in Cleveland because the current district has such an enormously large percentage of black voters in it that you won't get much of a disparity. But there are some places, for example Bratenaw is in a black senate district.

Q. Well it is fair to say that throughout the State you analyzed where blacks were located, correct?

A. Correct.

[38] Q. By reference to census?

A. Correct.

Q. And you looked at how they voted.

A. That's correct.

Q. And you did that in Cleveland.

A. Recognizing, of course, that the 1990 census data doesn't correspond directly to the old districts.

Q. I understand. But within that range of error which we can assume exists—

A. Right.

Q. —you looked at the patterns of black voting in the major metropolitan areas in Ohio, correct?

A. Yes, um-hum.

Q. Did you do regression analysis?

A. No.

Q. Again was this because of the pressure of time?

A. Yes.

Q. But you did evaluate black voting patterns in—let me just take the major cities—in Cuyahoga County and Summit County and Hamilton County, Franklin County, Montgomery County, Lucas County.

A. To the best of my knowledge, yes.

Q. All right. For what purpose did you analyze these black voting patterns?

A. To try to show that or to satisfy ourselves [39] that there was a preference of black voters for black candidates where that choice is available, but most importantly that the white majority or component of that district that was made up of white voters did not support the black candidate in anywhere near those numbers, effectively to show there was polarized racial block voting.

Q. Did you end up with any writings on that point?

A. No. Again, we were under enormous time pressure to get the plan out on time.

Q. So you have nothing in writing which would demonstrate what your conclusions were.

A. That's correct.

Q. Did you observe that there were a number of black legislators being elected with white crossover votes in Ohio?

A. Yes.

Q. Seven of them, for example.

A. Um-hum.

Q. And is it your contention there was racial block voting in each of those seven legislators' districts?

A. There are some, yes, but obviously there is always a crossover of white vote.

Q. "It is legally significant racial block voting [40] that is menitoned in the Jingles case:" do you recall that?

A. Yes.

Q. Did you find legally significant racial block voting in connection with the seven districts where the minorities were elected with less than a majority of minority population?

MR. COLLIER: Could I have that—excuse me, could you read back that question?

(Question read.)

A. Well, I think that is a very difficult question to answer. I think even among the judges who have written in this area the question of what is legally significant is

a matter for some difference of opinion, and I think one of the things that we all know to be the keys is that several of those minority representatives, two of them that I am aware of immediately, were appointed to fill a vacancy replacing white legislators and therefore able to run as incumbents in districts that were strongly Democratic, and at least two others succeeded to the office upon the death of their spouse and therefore had not only the advantages of incumbents but the advantage of name and party.

So it's a difficult question to answer. But what we did find was that given the opportunity there is [41] a much higher percentage of black vote for black candidates than white vote for black candidates.

Q. All right. We will come back to that. Do you understand the process of regression analysis for racial block voting?

A. It's been a long time since I taught political science and statistics was not my forte, so I would not consider myself to be an expert in regression analysis.

Q. You could not conduct such an analysis yourself at least at this point without refreshing yourself?

A. I think that is a fair statement.

Q. And you made no effort to do that, correct?

A. That's correct.

Q. No one on the staff that worked for you made any effort to do the regression analysis?

A. That's correct.

Q. Who worked for you, Mr. Tilling?

A. Really two individuals, Bob Clegg, who is director of operations for the Senate Republican caucus, and David Potts, who is one of our caucus administrative assistants.

Q. What did Mr. Clegg do?

A. Well, he and Dave Potts together basically handled the computer side of the operation. And I directed them basically, you know, where to draw lines [42] and they did that and prepared demographic reports. And so they

basically served as my two assistants in this process, basically doing what I asked them to do.

* * * *

[50] Q. I am not suggesting that we should ignore federal supremacy. What I am asking you is whether or not you were conscious of drawing lines to comply with the Voting Rights Act, whether or not those lines would conflict with the Ohio Constitution lines.

Let me make—give you an example.

A. Okay.

Q. Let's assume, for example, all of Ohio was white, there were no blacks living in Ohio. Then there would be presumably little or no reason to draw—and they are all the same religion, all the same ethnic background, so forth. There would be no reason except the Ohio Constitutional provisions to govern the drawing of lines, correct, with that hypothetical? You would not have to go to some federal guideline.

A. I don't know that you can say that. I hate to answer hypothetical questions. They always have a habit of getting people in touble. I mean regardless of—

[51] Q. What would be the reason to depart from the Ohio Constitution?

A. Well, anything that, in any instance where something in the Ohio Constitution ran afoul of the United States Constitution then you would have a problem and have to be disregarded because, as you said, in the supremacy clause it indicates that.

Q. But the Voting Rights Act deals with race.

A. Right.

Q. And I have taken race out of the mixture. So with race out of the mixture here—

A. Well, it does deal with other things besides race. I mean there is race, there is ethnic origin, there is language that basically deals with a whole class of minority interests.

Q. Protected class, I should put it more correctly. But absent the existence of protected class, there is no

reason why you couldn't simply follow the Ohio Constitution, true?

A. Well, as I said before, I think we did follow the Ohio Constitution.

Q. Well, Mr. Tilling, there were times when you would cross boundaries in order to comply with your understanding of the Voting Rights Act, correct?

[52] A. That's correct.

Q. And if there had been no Voting Rights Act requirement you would not have had to cross those boundaries, true?

A. Without doing an encyclopedic review of the entire process I think that's probably correct.

Q. We can't give you each place that it occurred but it occurred from time to time?

A. Right.

Q. And when you thought that that occurred you followed the basic concept of federal supremacy.

A. Correct.

Q. And you drew the line as you perceived the Voting Rights Act requirement.

A. That's right.

* * * *

[79] Q. Picking up on your point about blacks [80] statewide, do you know the approximate population of blacks statewide?

A. Slightly under 11 percent.

Q. And so they are slightly overpopulated in terms of whether or not there is a one-to-one ratio in the House of Representatives and slightly underpopulated in the Senate; is that correct?

A. Correct.

Q. Have you any understanding, and I use that in the broadest sense, of voting patterns of blacks in terms of their political preferences?

A. Are you talking about statewide?

Q. Yeah, statewide, when they are registered Democrats, for example, or registered Republicans.

A. Yeah, I think that most experts recognize that blacks tend to support the Democratic Party in overwhelming percentages unless they have a good reason not to.

Q. Do you have any sense of what the figures are in Ohio of that support for the Democratic Party in general? And I am not trying to ask you to be specific in a race.

A. Well, again it's hard to answer that question in general because—

Q. Give me what your knowledge is.

[81] A. My knowledge is that unless a particular candidate or campaign makes an effort to appeal to minority voters they are likely to vote Democratic in percentages from 85 to 95 percent.

Q. You were aware of that fact, it was in your memory in your head at the time you drew districts, true?

A. Correct. But I would also say in many of our races for the Ohio Senate we have made a special attempt to appeal to minority voters. And one of the reasons we have been successful is because we have done a better job and have done substantially better than the statewide average in terms of appealing to black voters.

Q. In the Senate races; is that what you are saying?

A. In the State Senate races, that's right.

Q. You have not, however, elected a black senator.

A. That's correct. We have had several run in the primaries and several run as candidates, but we have not elected a black to the Senate since John Bowen here in Columbus, which was before the time I came to the Senate.

* * * *

[92] Q. Who made these choices saying yes or no because you have to make choices on which census block would be included and which would not.

A. I did.

Q. You did in every instance?

A. Uh-huh.

Q. Did you have any assistance in doing that?

A. I had assistance from Bob Clegg and David Potts in the sense that they worked the screen and I looked and basically we tried to—initially what we were trying to do because it's the only data that we had was to draw the districts based on census geography, knew at some point we were going to have to make a conversion to [93] political boundaries to conform with the Constitution's wards and precincts, but here we were basically concerned with trying to use the data to draw majority/minority districts strictly based on census geography.

Now, some of the census geography for some of the suburbs is the same, so you could see some of that on that map, but basically decisions were mine.

* * * *

[97] Q. Essentially black population displayed on this map, is that right?

A. Black voting age population, right.

Q. Yes. And that's information that just shows you where blacks are located, correct?

A. Correct. As I indicated I think earlier when we came to begin work, in each of the urban counties with a substantial minority population we put up on the screen first the minority population being minority voting age population and Hispanic population just to give us an idea of where the concentrations of minorities were.

Q. So you would look at something like Exhibit 22 for each of the major urban areas as you were working them?

A. That is correct.

Q. And that would be the first thing you did.

A. Correct.

* * * *

[100] Q. When you think in terms of electing a candidate of choice, that's your understanding of what the Voting Rights Act requires.

A. That's correct.

Q. That minorities have the opportunity, equal opportunity to elect candidates of choice, correct?

A. Correct.

* * * *

Q. Was there a range in which you thought that minorities, a range of concentration of minorities in a particular district which you thought would give them the opportunity to elect a candidate of their choice? What ranges were you thinking about?

A. We didn't have any set figure in mind. That's [101] something to look at individually on a case-by-case basis.

Q. Very specific, region by region?

A. I'd say the answer to that varies area by area, correct.

Q. Area by area.

A. Right.

Q. Something you need to examine, in terms of the Voting Rights Act parlance, practical realities in a specific geographic area; is that correct?

A. Uh-huh, yes.

* * * *

[127] Q. Was there ultimately any hiring of Mr. Johnson, Floyd Johnson as a consultant, to your knowledge?

A. Yes.

Q. Who hired him?

A. The Senate did.

Q. At $7,800?

A. I believe we made it for combination Apportionment Board related, that is, State, House and Senate districting work and congressional districting work and I believe we settled on a figure of $10,000.

[128] Q. Was that in a contract?

A. Yes.

* * * *

Q. And has money been paid to Mr. Johnson?

A. Yes, I believe so.

Q. How much?
A. I really don't know.
Q. Who would know that?
A. Probably the Clerk of the Senate.

* * * *

[129] Q. When was that paid?
A. To the best of my knowledge it was paid in installments.
Q. In what period of time?
A. Over several months. As I said, I don't have the contract. I'm not totally certain of that but over the last two or three months probably.

* * * *

Q. Was there any discussion as to whether this was a potential conflict of interest?
A. Yes. In fact, I talked to the national office of NAACP in particular to make certain that they would not feel that this was some conflict of interest.
Q. Who did you talk to?
A. Clifford Collins. In fact, Floyd also talked to the State President and basically the answer was that as long as he was not represented to work for NAACP and [130] advising us on the drawing of our districts, then it would not be a conflict of interest as far as they were concerned.

* * * *

[132] Q. But again he, when he gave you the benefit of his views, was not speaking for the NAACP.
A. That's correct.

* * * *

[138] Q. Is it your testimony then that the Montgomery plan was really drawn by the NAACP?
A. I believe that's the case.
Q. Who drew it?
A. Well, again. I'm assuming that Floyd Johnson was the overall architect. He's from Dayton and I think

understands that area and who he might or might not have consulted with in Montgomery County or these other counties I'm not totally aware of but I do know he was involved with drawing of the Montgomery County district —districts I should say.

Q. You don't know anyone else that worked with him on it?

A. For Montgomery County?

Q. Yes. Mr. Jackson worked with Mr. Johnson, if you know?

A. You'll have to ask him about that specifically, but I did, in talking to Jeff, I indicated to him as I did to several other Republican county chairmen that I talked to that these were the guidelines that we had to operate under. You ought to go look at the Ohio [139] Constitution and read its provisions and that we had already indicated a willingness to work with the NAACP and told him who Floyd was and that he was from Dayton and suggested that he get in touch with him, so I'm assuming there was contact there.

Q. But you don't know, is that what you're telling me?

A. Well, subsequent to that, as the NAACP submitted a plan, and as I indicated before Floyd worked on the computers, the public access computers here, my understanding is that he also received some assistance from Jeff in that endeavor but personally I'm not aware of what that consisted of.

Q. Received some assistance from Jeff and, I missed—

A. From Jeff Jacobson. I'm not sure what that assistance consisted of.

* * * *

Q. I guess I'm just trying to exhaust your [140] recollection if you can recall how that intelligence came to you.

A. As I said, I recommend to Jeff that he contact Floyd. It's conceivable I could have talked to Floyd and

asked him how he was coming and followed up on that conversation. I don't remember doing that.

* * * *

[145] Q. Is that what Mr. Johnson said to you?

A. Basically, his interpretation in our conversations was similar to mine and basically we agreed that that was the operating philosophy that we should adopt.

Q. Had he done any racial block voting analysis?

A. I believe so, but you'll have to ask him to be sure.

Q. Had he done any regression analysis?

A. Again, I don't have any way of answering that so you'd have to ask him.

Q. You have no present knowledge?

A. Correct.

Q. You do not recall him telling you that he had done any such?

A. That's correct.

Q. Had he done any correlation studies?

A. Again, I have no direct way of answering that.

* * * *

[148] Q. So you did no political index investigation of what the results would be.

A. That's correct.

Q. In Montgomery County. That information would have been available to Mr. Jacobson, however, on the [149] data base, correct?

A. Uh-huh, as far as I know. Actually it was available to anyone.

Q. It would have been available to you?

A. Yes.

Q. Or any member of the public, correct?

A. Correct.

Q. Do you know whether Mr. Jacobson made any evaluation along those lines?

A. No, I don't.

Q. Do you know whether the Hamilton County chairman made any evaluation along the lines of the political advantages that would come out of the redistricting of Hamilton County?

A. No, I do not.

Q. As I understand it, you're indifferent to that subject anyway.

A. That's correct. It had no bearing on our work whatsoever.

* * * *

[160] Q. You're aware that Ohio is, I believe as you said, is not a preclearance state.

A. That's correct?

Q. And preclearance means that a state would be required under Section 5 of the act before there is any change in their law concerning a reapportionment state to have it precleared through the Attorney General, is that right?

A. That's correct.

Q. And the areas to which that would apply would be such areas as of November 1964 had a literacy test and less than 50 percent of the eligible voters were registered. Is that the test?

A. I believe there is 17 jurisdictions, my recollection tells me throughout the United states. Most of them are southern states but there are—

Q. There are pockets other places?

A. New York City and areas like that but primarily they are southern states.

* * * *

[161] Q. Was it your position that Section 2 of the act requires you wherever possible to draw districts between 51 percent and 65 percent?

A. My interpretation of Section 2 is read in conjunction with Article—or I should say Amendment 14 and 15 of the U.S. Constitution that we should do everything in our power not to dilute minority voting [162] strength.

MR. GILLIAM: Read the question back, please.

(Question read.)

A. Well, Section 2 requires us not to dilute minority voting strength and a series of court cases that have been decided basically say that where there is evidence of racial block voting and where the candidates supported by the white majority most often prevails in open counties, that where a minority is compact enough that a majority minority district can be drawn, that district should be drawn.

* * * *

[168] Q. Was it your determination that there had been violations of the Voting Rights Act in specific areas of Ohio and to redress those violations you in fact redrew certain boundaries?

A. I don't think I'm a competent person to judge whether Voting Rights Act violations occurred.

* * * *

[173] Q. Did you also determine that blacks as a group have less opportunity than others to elect representatives of their choices?

A. Yes.

[174] Q. And where did you determine that that was true?

A. From the same sets of information that we have just discussed. I mean the easiest example to use—because unlike many of the others it doesn't cut across party lines and introduce a potentially confounding variable of party allegience—is the Jackson vote for primary.

Q. That is a confounding variable, did you say?

A. It confounded the data.

Q. I see.

A. So basically you can get an example of voter preference within a political party, particularly when the class of voters that we're talking about does tend to support that party in very large numbers, then you get a pretty clear notion of whether or not the candidate can

elect—or whether or not the voters can elect a candidate of their choice.

Q. Let me ask you this. Would you consider that William Mallory was the candidate of choice in the district from which he ran, has been running?

A. I believe that would be a correct statement.

Q. Would you consider that Otto Beatty was the candidate of choice?

A. Certainly the evidence suggests that.

Q. Ray Miller?

[175] A. Yes.

Q. Vern Sykes?

A. Again the evidence suggests those people have been elected in those districts, and therefore at least in the elections we're referring to they were preferred by a majority of the voters given the choices that were available to them on the ballot.

Q. And been elected for some long years, true?

A. Some have and some have not.

Q. Would you conclude that Casey Jones was the candidate of choice?

A. As far as I can tell, and basically everything that we learned up in the public hearings in Lucas County, the answer is yes.

Q. And would you conclude that Helen Rankin was a candidate of choice?

A. That's a little bit harder to answer since she took over for her husband when he died, and therefore had the advantage of both name recognition and party and race. But certainly the evidence since that time admits that she has been successful.

Q. Rhine McLin, candidate of choice?

A. Same. Her father was one of the best known politicians in Montgomery County, and powerful, and she was able to fill that vacancy.

* * * *

[177] Q. Now, did you examine—well, let me just ask a few more questions here.

Is there any black candidate—I am sorry, black legislator—in Ohio who is not the candidate of choice from their district, as far as you know?

A. As far as I know, no. But I think that begs the question because the real question is why are there no blacks elected in districts without a sizeable black population.

Q. There are districts in which blacks are elected [178] with as low as 35 percent, correct?

A. That's correct.

Q. Tom Roberts being 36.1?

A. That's correct.

Q. We have Ray Miller in the 30s, correct?

A. That's correct.

Q. Casey Jones in the 30s, correct?

A. It might be a little higher than that.

Q. Vern Sykes?

A. Again toward the high end of the 30s, low 40s.

Q. Doesn't that strike you as remarkable that there is some white votes for a black candidate; did you notice that in the state?

A. Yes, we did. It is not remarkable. It reflects the way the districts were drawn in 1981 to make sure there is a correlation between black voters and strong Democratic districts.

* * * *

[184] Q. Mr. Tilling, I have a very simple question.

With respect to the voting of representatives, all of the representatives in the House, you in fact did not examine the voting records specifically of those representatives to determine if they were representatives of choice, did you?

MR. COLLIER: Are we talking about black representatives now?

Q. I am talking about all representatives.

Q. You made no such determination.

A. We did not examine the voting records of all 99 House incumbents, that's correct.

Q. And can you name the voting records of any specific representative that you looked at to determine if that person was a representative of choice?

A. Well, again I think that is an irrelevant question.

Q. It is not irrelevant. It is my question.

A. It doesn't matter whether it is your question or not. It is an irrelevant question. Because—

[185] Q. Mr. Tilling, let me stop you. You are not to decide what is relevant or irrelevant. You are to answer the question unless you are instructed otherwise.

MR. COLLIER: He is trying to do that. You can go ahead and finish.

Q. I am asking you a very simple question.

MR. COLLIER: Well, do you want him to answer the last question to the best of his ability?

MR. GILLIAM: I am going to withdraw that and ask him another question.

Q. I am asking you a very simple question. Did you examine the voting record of any single representative in the House of Representatives to determine if they were responsive to the minority community on the basis of their voting record? You can answer that yes or no.

A. The answer is no. I don't think it's a relevant question, but the answer is no.

Q. Now, did anyone else do that, if you know?

A. Not to my knowledge.

• • • •

[206] Q. You used the word "if." Did you try to draw districts that the Republican Party would benefit?

A. No, I did not.

Q. Looking at Exhibit 3, I noticed that 20 Democrats were paired with each other. Did you notice that?

A. Not until afterwards.

• • • •

[207] Q. Did you draw the plan for Lucas County which did in fact pair Casey Jones with Mr. Czarcinski?

A. Yes.

Q. But unconscious of the fact that you had paired them?

A. Absolutely.

Q. And you were unconscious of the fact that you had paired Judy Campbell—I am sorry, Judy Sheerer. Jane Campbell, and Representative Bergansky?

A. Correct.

Q. And you were unconscious of the fact that you had paired Vern Riffe and Representative Malone.

A. The answer to that is yes, although I did have a sense that Representative Malone lived in the southern part of Lawrence County, but exactly where he lived I don't know.

Q. So you really didn't know you had done that?

A. That's correct.

Q. You were unconscious of the fact you had paired Stinziano and Cordray.

[208] A. Yes, that's correct too.

Q. And you were unconscious of the fact that you had paired Guthrie, Mechling and Abel. Is this funny, sir?

A. No, I just—I would prefer you to use some other term than "unconscious." Unaware would be a little better. Unconscious has an unfortunate connotation to it.

* * * *

[212] Q. In your view is it possible for a white representative to be the representative of choice for a black community?

A. That would be up to the black community to decide, but it's certainly possible, yes.

* * * *

DEPOSITION OF JAMES R. TILLING
(November 22, 1991)
[Docket #103]

[9] Q. Now, with respect to the Jackson analysis, did you do any analysis of those results other than just simply observe what they were?

A. No, we did not.

* * * *

[13] Q. Were people asking you to make specific boundary lines drawn for example?

A. Sure, we got many suggestions for specific boundaries, either on a district-by-district basis or portions of districts.

Q. Do you recall any such requests from Republican legislators?

A. Sure.

Q. Who?

A. Well, as I indicated many of them contacted us about their own particular districts. I'm sure that I [14] cannot give you an exhaustive list because many of them were either phone calls or personal conversations and as I said they all tend to blend in together.

* * * *

[22] Q. Did they give you documentation?

A. No, they did not. By "they" I mean black elected Democrats of Ohio. They did not give us documentation. The only input we got was from NAACP.

* * * *

[35] Q. Are you familiar with Deposition Exhibit No. 84, Mr. Tilling?

A. Yes, I am.

Q. Would you identify it for the record, please.

A. It's an article that appeared in Congressional Quarterly, I guess, a couple years ago, November of 1989, talking about redistricting in Ohio. In this particular context, they're talking about congressional [36] redistricting.

Q. They state that you hold two official titles: chief executive officer (an administrative position) and chief of staff for the GOP caucus; is that correct?

A. That's correct.

Q. And as chief of the Staff of the GOP caucus you develop policy positions for leadership, correct?

A. When they listen to me, yes.

Q. You're also director of the GOP caucus campaign committee?

A. Such as it is. Actually, that's probably a misnomer. The campaign committee is run by co-chairman and those have always, since I've been here, been our No. 1 and 2 leaders, Paul Gilmore and Stan Aronoff most of that time and most recently Senator Aronoff and Senator Hobson and Senator Hobson and Senator Feighan.

Q. The statement says, "but his after hours job, director of the GOP caucus campaign committee, has earned him the most notice." Is that an accurate statement?

A. That's what the article says. And as far as being the No. 1 staff person I also am the No. 1 staff person for the campaign committee.

* * * *

[39] Q. Did you do any studies of the community in the sense of going out into the community? I know your 15 hearings too many places, but other than those, did you go into the communities and conduct service?

A. No, we did not.

Q. Did you do any issues research in connection with the 1991 apportionment?

A. No.

* * * *

[48] Q. Did you use the Governor's race, the Attorney General's race to evaluate any political impact of any of the redistricting that was drawn?

MR. DELEONE: May I just interrupt for a moment. You're asking him a general question now not related to this document; is that correct?

MR. GILLIAM: That's correct.
MR. DELEONE: All right.
A. Let me see if I got—
MR. DELEONE: Read it back to him.
(Question read back.)
A. I think I indicated Wednesday that there were two or three occasions where we did look at political data, but as I also think I indicated at that time we did not use political data to guide us in the drawing of the map in its entirety.
Q. I'm asking you if you used that data to evaluate the political composition of districts after they were drawn?
[49] A. After they were drawn I believe that we did, yes.

* * * *

[62] Q. Did you discuss that with anybody before the plans were drawn and adopted? In other words, let me [63] put it rather simply. When you move black population into a district you obviously deplete black population in another district or another area. And my question is did you discuss that fact with anybody at all before the plan was drawn and adopted?
A. I don't think so. It sounds like a simple question but it really is not, and I'm trying to jog my memory to the best that I can.
Q. Take your time. It's an important question.
A. Well, I can recall at one or more panels of our reapportionment task force and and also I believe a meeting that I attended in Washington that was sponsored by the National Republican Legislators Association, where the issue of complying with the Voting Rights Act and supporting court cases and equal protection clause was discussed, and it has been reported in the press, I've read the articles, that there is some sort of master conspiracy between Republicans and blacks so that by increasing the number of majority minority districts, which is obviously a goal that black leaders are interested in

and black community has a very powerful stake in, that the consequence of that would be to allow Republicans to elect more Republican legislators in outlining districts. That subject is not a secret. As I said it's been widely reported in the press and was the [64] subject of several panel discussions at National Conference of State Legislators.

It certainly has been the position articulated by spokesmen from the Democratic National Committee and several of them have been on these panels with their counterparts from the Republican National Committee talking about the Voting Rights Act and its implications. So to the best of my knowledge, I have been in several forums where this issue and the consequences have been discussed.

* * * *

[65] Q. With respect to the answer you just gave me, in that answer you referred to a couple of meetings. One was the meeting of Republican legislators?

A. I think the Republican Legislative Leaders Association I believe is what it's called. They had a meeting in Washington as I recall which they asked me to come and give a presentation on a certain topic.

Q. What was your topic?

A. I believe the topic was building a record. They asked for people to come in who were representatives of minority caucuses and then they wanted me to come in as somebody that was a representative of a majority caucus talk about how one might document cases that might ultimately go to court particularly on the issue of voting rights.

Q. And did you speak on that subject?

A. Yes.

[66] Q. Do you have notes of that speech?

A. No.

Q. Well, did you have them at one time?

A. No.

Q. What did you say about how one might document a case that might go to court?

A. Well, the primary content of the panel was directed to those states who would be preparing cases to challenge an existing apportionment plan, and it is my understanding and belief that in preparing a case to challenge the actions of a duly constituted apportioning body, you have to have a very substantial body of data to prove that what they did was not correct.

Q. A Voting Rights Act violation.

A. That's correct. If however you are in charge of that process, then the burden of proof falls on those people challenging your plan to prove that what you did is inconsistent with your constitutional responsibilities.

And what I really talked about was some of the things that we were trying to do in Ohio that never been done before, such as opening up the process by having public hearings, providing a unified data base so that that would remove one area from potential legal confrontation, that is, all sides would have access to [67] the same data base, and that we were going to have a period where all plans had to be submitted by a certain date. They would then be open to public discussion and then on the basis of that corrections or changes could be made, then there would be more public inpu and ultimately the Apportionment Board could make a vote. So in terms of our discussing from a majority State's position what the record needs, we try to distinguish between challenges to an apportionment plan coming from Plaintiffs as opposed to actually drawing a plan within the confines of constitution and the statutes, and then in particular, because this stems from Voting Rights Act cases, the need to give the minority community and others interested in this process more access than had been granted in the past and that basically was the thrust of what I tried to get across.

* * * *

[70] Q. Well, identify the document for me, please.

MR. DELEONE: If he can.

A. Well, it's a typewritten sheet which is headed "Republican Opprotunities" I believe if memory serves me correctly, it also—

MR. DELEONE: Let me inquire. Did you prepare it?

THE WITNESS: No.

MR. GILLIAM: I would like an answer to this question.

MR. DELEONE: All right. Go ahead.

Q. Would you identify it, please.

A. Yes, to the best of my ability it is a document that relates to a map of the State of Ohio and it was submitted to me, I guess, and purported to be somebody's best guess of how a Republican gerrymander that maximized Republican Opportunities to take control of the House might be devised.

• • • •

[71] Q. (By Mr. Gilliam) All right. It did come from your files, true?

A. That's correct. It was given to me during the course of our work on the apportionment process. It is not a document that I prepared. It is something that [72] was given to me.

Q. Who gave it to you?

A. I am not sure that I can answer that question exactly.

Q. Well, what's your best answer?

A. I am trying to recall here because I think I know what you are getting at and you are going to be disappointed.

MR. DELEONE: Just answer but finish your answer.

A. At the beginning of this process what I was hoping to be able to do was to establish what would be a worst case scenario for a Republican gerrymander and a worst case scenario for a Democrat gerrymander. And I believe

that I talked to and I want to think about this for a minute. I think I am right in this.

I believe I talked to State Representative Joan Lawrence who had been involved for some time with an individual named David Horn from Athens who has been involved in reapportionment and redistricting for at least 15 years, maybe more. In fact, has done research and has actually written papers and presented various conferences. And I think that she—well, I think I asked her whether or not he would be participating in the public hearing down in Athens because when I first [73] became acquainted with them, he was involved in trying to secure passage of what originally was called the Dale Locker Amendment, Locker being a Democrat State Representative from Anna at the time. And Dale was a proponent as was David Horn of a mathematical system for doing redistricting and doing reapportionment. And because we were going to have public hearings at this time and because this is a somewhat novel approach to the process, I think I asked Joan if she could work with David on these projects, whether or not she knew whether he was going to testify.

And I believe she told me that it was her understanding that he was not and he still was, you know, in favor of his mathematical approach to redistricting and really thought the current system was something that needed to be changed. And I believe in the course of his research, he prepared, and again this is the best of my ability, he prepared a Republican gerrymander and I think he considered the 1971 Democrat apportionment map to be the sort of model for a Democrat gerrymander.

And I asked Joan because, as I said, I had this idea that I would like to be able to set out what the parameters are or could be on each side, show the extreme that could be accomplished by a Democrat and [74] extreme that could be accomplished by a Republican so that when I made a presentation to the Apportionment Board I could show them a whole series of plans and say if you want

a Republican gerrymander, here is what you could get. If you want a Democrat gerrymander, here is what you get. If you want a fair map, and basically give them a series of alternatives that they might choose from because at the beginning of this process nobody really had any idea how many plans might be submitted by how many groups. And I had made it clear that I felt it was the Apportionment Board's responsibility that—to pick the best plan befone them and so therefore I wanted to try to prepare a whole series of alternatives and explain to them in some fashion what each one of these alternatives was and then let them decide.

So she—and again, this is to the best of my recollection—she checked with Dave Horn or somebody in his group and in fact they did have a plan that they had looked at and she brought it up for me to look at and initially I thought about putting it into our computer and producing it so that it would be in a form comparable to any of the other plans that we had before us.

But ultimately as I think I have testified [75] before, by the time we got the data on the unified data base from Cleveland State and actually began drawing plans there simply was no time to do that. So it was a plan that came into my possession. It purported to be somebody's best guess of how to gerrymander the state. I had an idea about what I could use it for, but ultimately we never did anything with it.

MR. DELEONE: Can we just break for 30 seconds, please?

(Discussion off the record.)

(Last sentence of last answer read.)

Q. So to the best of your understanding, Mr. David Horn is the person who created the Republican opportunities document which is in front of you; is that correct?

A. To the best of my understanding, yes.

Q. And when would that have happened?

A. Geez, I can't really say. I think it either—he either had already done it and Joan mentioned it to me in passing that it was something he had worked on. It was just kind of ironic because he is a Democrat of some longstanding, but he wanted it as I was interested in getting it for local purposes. So he either had it in his possession and she was aware of it or she thought he might be working on something. So I really can't [76] pinpoint it much except it was either in existence in some form before August or subsequent to a conversation it was completed and given to me, and I got it some time—to the best of my knowledge it came in some time in the middle of September when we were beginning to get to work on our plans, and I am pretty sure that it didn't come in any later than that because if it had come in after the mid point of September, it would have been obvious to me there is no way we could have put a totally separate plan of somebody else's and any expectation of finishing our own.

Q. And Joan Lawrence is who again?

A. She is a State Representative from Galena, Delaware County.

Q. Is she a Republican?

A. Yes.

* * * *

[80] Q. Did you show this to anyone else?

[81] A. No.

Q. Discuss it with anyone else?

A. No.

Q. Just put it in your file?

A. Uh-huh.

Q. You read it?

A. Yeah, I looked at it and I set it aside in our room with the idea that we would try and put it in the machine and see what it really looked like but we never got to it so effectively it was just gathering dust.

Q. And have you had any conversations with Mr. Horn since then?

A. I didn't have a conversation with him in the first place and certainly not since.

Q. All right. Did he actually give you this document or did Joan Lawrence give it to you?

A. I can't remember. I know I talked—let me put it this way. I believe I talked to Joan and I am pretty sure about that and it came to my office and I believe that, you know, she in one way or another got it there but, you know, I can't vouch that it came. It was delivered when I was not there, but since I had asked her to see if she could get it I assume it came from her. But I can't be positive of that.

* * * *

[Exhibit 86 to Deposition of James R. Tilling (November 22, 1991)]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK and
JUDGE ALVIN I. KRENZLER

BARNEY QUILTER, *et al.*,
Plaintiffs,

v.

GEORGE V. VOINOVICH, *et al.*,
Defendants.

AFFIDAVIT OF LAURA A. SANOM

STATE OF OHIO)
) ss:
COUNTY OF MONTGOMERY)

Laura A. Sanom, being first sworn upon oath, says:

1. I am an attorney licensed to practice law in the State of Ohio. I am an attorney with Faruki Gilliam & Ireland and one of the attorneys representing the Plaintiffs in the above-referenced matter. I was the attorney

responsible for reviewing Mr. Tilling's documents. I am making this affidavit based upon personal knowledge and am competent to testify to the matters stated below.

2. On Tuesday, November 19, 1991, I reviewed one box of documents in an office adjacent to Chief of Staff for the Senate Majority Leader, James R. Tilling. Defense counsel, Mr. Vic Goodman, represented to me that the box of documents that I was reviewing had been produced from the files of Mr. James Tilling.

3. At approximately 3:00 p.m. on Tuesday, November 19, 1991, I found the attached document (exhibit A) loose in the box of documents produced by Mr. Tilling. The document was located among numerous 1990 census papers. I had the attached document copied immediately by the representative from Records Deposition Service, who was copying Mr. Tilling's documents for me in the hallway outside Mr. Tilling's office.

/s/ Laura A. Sanom
LAURA A. SANOM

Sworn to before me and subscribed in my presence by Laura A. Sanom to the best of her information, knowledge and belief, this 22d day of November, 1991.

/s/ Brenda K. Hinkle
Notary Public
In and for the State of Ohio
My Commission Expires April 15, 1995

REPUBLICAN OPPORTUNITIES

There exist 19 such "opportunities." Some are better than others.

Cuyahoga Co.: Create new, open districts 5 and 17. Attach incumbent Kasputis onto new HD 12 in south suburbs. To do so requires 3 pairings of Demo. incumbents, as suggested on map. HD 5 is a cinch. HD 17 is problematical. Opportunities = 2.

Franklin Co.: Pack as many Demos as possible into 2 Black-majority inner-city HDS. Divide remaining Demos evenly among 7 Republican-dominated HDs. Pair Conley with Davidson. Pair Stinziano with Thomas. Add some of Madison Co. to provide more Republicans to mix. Make sure Cordray is in heavily-Republican district and recruit good candidate. Create 3 new, open, districts. Opportunities = 4.

Hamilton Co.: Pack as many Demos as possible into 2 Black-majority inner-city HDs. Divide remaining Demos evenly among 4 Republican-dominated HDs. Pair Tranter and Luebbers with strong Republican incumbents in strongly Republican districts. Opportunities = 2

Montgomery Co.: Pack as many Demos as possible into 2 Black-majority inner city HDs having incumbents Roberts and McLin. Break up Hickey's district, pairing him with either Guerra or Corbin in heavily-Republican HD. Create new, open HD in southern and western townships. Opportunity = 1.

Summit Co. Lucas Co. No opportunities. Protect Republican incumbents Watkins and Greenwood.

Stark & Mahoning Cos.: Create new HD 70 with "spill-over" containing Demo. incumbent Vukovich and GOP incumbent Johnson. Johnson will have decided advantage. Pack all Demos. possible into Healey's district. Add as many Republicans as possible to district of Demo. Johnny

Maier, and recruit strong Republican challenger. Opportunities = 2.

Lorain Co. Pair Bara and Walsh in new HD 52, creating new, open. Republican-dominated HD 72. Opportunity = 1.

Clark Co. Maximum districts rule says there must be one HD wholly within county, but doesn't say how lines must be drawn. So split Hartley's urban, Springfield base between new HD 61 and "spillover" district 76, weakening him. Opportunity = 1.

Richland Co. Maximum districts rule applies, as with Clark Co. Split urban Mansfield between new HD 65 and "spillover" district 77, weakening Sawyer. Opportunity = 1.

Create 5 new, open districts in the "rural" counties by creating 3 Demo.-Demo. pairs, and pairing 2 other Demos with strong Republican incumbents in Republican-dominated districts: (Opportunities = 5)

HD 85: pair Demos. Deering and Wise, creating new, open HD 69.

HD 89: Pair Demos. Riffe and Malone, creating new, open HD 92.

HD 99: Pair Demos. Secrest and Cera, creating new, open HD 95

HD 78: Pair Demo. Mechling with Repub. Myers, creating new, open HD 91.

HD 87: Pair Demo. Weston with Repub. Lawrence, creating new, open HD 86.

Make good on 12 of these opportunities and you know the consequences.

This plan meets all the enforceable provisions of Article XI of the Ohio constitution.

[Exhibit 89 to Deposition of James R. Tilling (November 22, 1991)]

District Report for Plan 'planl' House
Thu Sep 26 14:46:21 1991

Target Population = 0

District	Persons	% Rep Go	% Rep So	% Rep Ag	% Black	% Hisp
HD13	105433	41.52	35.27	32.26	5.95	15.78
HD17	76428	56.32	45.44	43.55	1.75	1.64
HD19	150154	49.74	40.81	37.38	2.46	1.81
Averages	110672	49.19	40.51	37.73	3.39	6.41

[Exhibit 92 to Deposition of James R. Tilling (November 22, 1991)]

District Report for Plan 'planl' Senate
Wed Sep 25 13:23:17 1991

Target Population = 0

District	Persons	% Rep Go	% Rep So	% Rep Ag	% Black	% Hisp
01	343356	64.57	62.58	60.21	0.60	3.25
02	339129	57.26	56.11	50.01	3.14	2.31
03	329381	60.74	62.36	60.36	6.89	0.96
04	331592	63.60	63.34	59.03	4.01	0.47
05	320460	46.32	45.82	42.45	29.43	0.73
06	333374	64.15	61.61	59.15	2.78	0.75
07	335118	68.77	69.80	62.99	3.40	0.58
08	328122	67.98	68.46	60.29	3.47	0.50
09	316897	39.94	43.15	35.02	50.73	0.67
10	321278	62.96	58.43	57.64	7.91	0.80
11	325884	44.72	44.81	36.28	20.10	4.03
12	323467	65.17	62.12	59.17	4.38	0.76
13	338107	55.50	50.01	47.22	6.40	4.76
14	333382	60.17	61.17	57.07	1.24	0.38
15	319419	34.24	36.06	35.69	37.78	0.98
16	330308	60.39	62.53	60.88	3.70	0.95
17	337339	52.52	54.37	55.97	2.98	0.35
18	315320	59.35	51.40	48.69	2.11	0.95
19	332454	61.91	54.69	59.12	3.77	0.64
20	338635	52.71	54.44	54.75	1.94	0.30
21	316114	33.59	23.71	21.17	62.93	1.29
22	323068	64.64	56.92	52.80	2.16	0.56
23	333305	52.24	43.27	40.92	3.38	6.19
24	340038	60.78	50.09	46.85	1.22	1.08
25	323430	44.14	33.39	27.76	40.58	0.74
26	330373	61.60	58.73	56.63	2.32	1.95
27	320167	59.28	56.15	47.45	4.14	0.54

28	337408	48.94	46.67	39.58	15.36	0.62
29	328318	58.32	53.11	49.63	6.68	0.78
30	329787	46.35	41.97	41.44	2.40	0.38
31	332443	52.97	56.97	56.58	1.50	0.50
32	308879	49.25	44.98	43.01	5.27	0.57
33	330594	45.08	40.08	41.50	12.98	1.89
Averages	328695	55.16	52.40	49.31	10.84	1.28

House to Senate Assignments

Senate	House
01:	HD82, HD83, HD86
02:	H04, HD51, HD53
03:	HD24, HD25, HD26
04:	HD58, HD59, HD60
05:	HD38, HR39, HR43
06:	HD40, HD41, HD42
07:	H02, HD35, HD36

DEPOSITION OF JAMES R. TILLING
(November 25, 1991)

[Docket #101]

[39] Q. I may have gotten that out of order. Exhibit 107, can you identify that, please?

A. Yes. This—I think I mentioned this the other day. I asked when we were getting this process off the ground, I asked Terry Casey, executive director of the Franklin County Republican Party, if he could give me a synopsis of the minority voting strength in Cuyahoga County by census tract, and this is a report that he sent over to me.

* * * *

[50] Q. The next document appears to be a series of handwritten notes.

Deposition Exhibit 120 appears to be your notes, Mr. Tilling, of the process of reapportionment that you followed in actually drawing the lines. Can you identify it, please?

* * * *

A. It does, it is my handwriting. It does look like my notes as we prepared the plan of apportionment for the State. It looks like what I was trying to do was go down the relevant articles of the Constitution [51] and describe what we did at each step.

Q. And having done that you then actually go through the process of describing the various districts to be drawn; is that correct?

A. That's correct.

* * * *

[Exhibit 94 to Deposition of James R. Tilling (November 25, 1991)]

[illegible]

August 21st 1991

James Tillings
Chief Executive Officer
Ohio State Senate
Statehouse
Columbus, Ohio 43266

Dear Mr. Tillings:

Please accept this correspondence as the framework for a mini consulting agreement to provide working capital for me to access the technical information and computerized data available on the terminals in Columbus. My specific objective will be to look at minority districts and influence districts for Congressional, Senatorial and House of Representatives.

I will:

a.) Research and minipulate population data in voting tracts in Cuyahoga, Franklin and Hamilton Counties for Congressional Resdistricting of Ohio's nineteen district delegation to the next Congress. My goal would be to determine how minority voters could maximize their influence and assist in drawing districts within the framework of the Voting Rights Act.

b.) Research on the possibility of State Senate districts and influence districts for Minorities living in Franklin, Montgomery, Hamilton, Lucas and Cuyahoga Counties.

c.) Minipulate lines for new Ohio State Representative districts in those counties where their is significant minority voting population. The total contract amount for this report is $7,000 (or a total of 260 hours at a rate of $30.00 per hour).

I will prepare a written report on research work along with an invoice. However, since the clock is already running and recognizing the importance of this project to the minority population of the State of Ohio, I am requesting that should you approve this agreement please foward 25% ($1,950.00) of the contract to cover certain out of pocket expenses such as:

a.) Transportation to and from Columbus, Cincinnati and Toledo.

b.) Purchase of Large Precinct, Census tract and Ward Maps of these Counties.

c.) Purchase of computer time to plot voter registrations and voter turn out in the targeted districts.

d.) Purchase of miscellaneous disc paper and supplies.

e.) Purchase postage and express mail and telephone tolls for this short term project.

Thank you for the opportunity to work with you on this project.

Sincerely,

/s/ Floyd B. Johnson
FLOYD B. JOHNSON

cc. Jim Daniels, State President NAACP
Jesse Gooding, President Dayton Chapter NAACP
Frank Allison, President
Cincinnati Chapter NAACP

[Exhibit 100 (part—pages 7, 29-30) to
Deposition of James R. Tilling (November 25, 1991)]

AFRO-AMERICAN PERCENTAGE OF LEGISLATIVE DISTRICTS

	Senate Plans			House Plans			
County % Afro-American Population	Current (1981) Plan	Minimum Fragments	Compactness Threshold	Current (1981) Plan	Minimum Fragements	Fully Nested	"Republican Gerrymander"
Cuyahoga 340,989 = 22.8 1,498,295	*SD 21: 60.7 SD 25: 36.2	SD 21: 19.7 SD 22: 74.6 SD 24: 8.0	SD 21: 10.2 SD 22: 59.7 SD 23: 33.3	*HD 12: 72.7 *HD 14: 85.8 HD 15: 24.5 *HD 16: 91.6 HD 17: 17.9 HD 18: 10.7	HD 11: 15.5 HD 12: 63.6 HD 14: 64.6 HD 15: 43.7 HD 16: 92.1 HD 17: 22.4 HD 18: 10.0	HD 86: 24.7 HD 87: 22.8 HD 122: 48.7 HD 123: 63.8 HD 124: 76.9 HD 125: 80.8 HD 126: 58.7	HD 11: 54.3 HD 14: 77.6 HD 15: 52.5 HD 16: 53.9 HD 18: 56.9
Hamilton 165,994 = 19.0 873,136	*SD 9: 40.1	SD 8: 10.5 SD 9: 32.0	Same as Minimum Fragments	*HD 23: 42.2 HD 24: 27.1 *HD 25: 51.5	HD 22: 14.1 HD 23: 47.3 HD 24: 28.4 HD 25: 39.0 HD 27: 15.8	HD 1: 27.9 HD 2: 24.6 HD 3: 14.2 HD 9: 12.9 HD 10: 14.6 HD 11: 37.6 HD 12: 54.6	HD 23: 53.4 HD 25: 50.1
Franklin 131,016 = 15.1 869,109	SD 15: 26.3 SD 16: 12.1	SD 15: 27.7 SD 16: 5.6	Same as Minimum Fragments	*HD 29: 32.5 HD 30: 11.7 *HD 31: 44.9 HD 32: 20.7	HD 29: 18.5 HD 31: 14.0 HD 32: 30.8 HD 33: 40.7 HD 34: 11.4	HD 67: 10.8 HD 68: 46.1 HD 69: 27.5 HD 72: 48.3	HD 29: 53.8 HD 31: 38.5
Montgomery 94,561 = 16.5 571,697	SD 5: SD 6:	SD 5: 26.0	Same as Minimum Fragments	*HD 36: 47.5 *HD 37: 27.4	HD 37: 67.2 HD 40: 8.6	HD 13: 61.6 HD 14: 39.4	HD 36: 33.1 HD 37: 46.5
Summit 56,831 = 10.8 524,472	- -	SD 28: 16.0	Same as Minimum Fragments	*HD 42: 33.2	HD 42: 23.0 HD 43: 24.5 HD 44: 13.9	HD 80: 29.1 HD 82: 22.9	HD 42: 43.9
Lucas 63,901 = 13.5 471,741	- -	SD 11: 17.6	Same as Minimum Fragments	*HD 45: 40.2	HD 45: 34.7 HD 46: 13.2	HD 52: 41.7 HD 53: 13.0	HD 45: 51.8
Mahoning 41,075 = 14.2 289,487	- -	- -	- -	HD 52: 11.0 HD 53: 25.8	HD 52: 15.5 HD 53: 23.3	HD 113: 18.4 HD 114: 28.3	HD 52: 35.3

LET'S PRETEND

Suppose that in 1978 Republican Ted Brown had been re-elected secretary of state and the Ohio Republican Party had, therefore, won control of the apportionment board. Suppose that the Republicans had, in 1981, retained David L. Horn to prepare for them a districting plan for the Ohio house that would do everything possible to hurt Democrats, but still comply with the requirements of Article XI of the Ohio constitution.

Following is the plan he might have prepared. All its districts are within the ±5% population equality requirement; all are contiguous; all comply with the maximum districts and spillover rules. Here is a brief rationale for the plan's notable features.

Cuyahoga Co. Political demographics make it impossible to create more than one safe Republican district out of this county's fourteen. However, Rep. Deffiler (HD 12) had been appointed to a marginal district vacated by Republican Rep. Pope and Rep. Dean (HD 17) had similarly inherited a seat vacated by Republican Rep. Katchidorian. The wisest course is to do all possible to shore up their districts. The best we can do is a new HD 12 with an Index of 48.4 and a new HD 17 also with an Index of 48.4. At least two incumbents must be paired, since the county lost population in the 1970s and must go from 16 seats to 14. Make Democrats absorb the 2-seat loss by pairing Sweeney and Colonna in HD 7; Boyle and Ike Thompson in HD 15; Fisher and John Thompson in HD 18. To insure having no problem with the civil rights laws create five Black-majority districts—two of them (HDs 15 & 18) at the expense of white, urban Democrats Boyle and Fisher. Create a Black majority in HD 15 by removing census tracts 1401 and 1405 (having a small percentage of Blacks) from Cleveland Hts. and attaching them to HD 19.

Hamilton Co. In this "Republican" county the strategy is to "pack" as much of the Democrat minority as possible into two heavily Democratic districts (HDs 23 & 25) with Black majorities. Then fragment the remaining Democrats into six Republican-dominated districts, getting rid of white Democratic incumbents Luebbers (HD 21) and Tranter (HD 27) by pairing them with Republican incumbents Pottenger and Fix in heavily Republican districts. Republican incumbent Rep. Mayer is kept out of Republican Rep. VanVyven's district by the arm of HD 22 which extends northeastward into Springfield Twp. to pick up her residence. Create Republican-oriented open HD 21.

Franklin Co. Another "Republican" county where the strategy is similar to that in Hamilton: "Pack" the Democrats into HDs 29 and 31, each with enhanced Black percentages. Fragment the remaining Democrats into six Republican-dominated districts, eliminating white Democratic incumbents Conley (HD 32) and Stinziano (HD 35) by pairing them with Republican incumbents Davidson and Deshler in Republican districts. Create Republican-oriented open districts 30 and 34.

Montgomery. More like Cuyahoga where it is difficult to create more than one safe Republican district, but where the 1980 GOP tide elected Reps. Ballweg (HD 38) and Guerra (HD 40) in Democratic-oriented districts. The need here is to protect these two unsafe incumbents. Give Ballweg the "Republican" southeast corner of the county and attach nearby incumbent Republican Corbin onto a new Republican district based in Warren and Clinton counties. Give Guerra the "best" remaining part of the county (Index = 43.9). Concentrate Democrats in HDs 36, 37, and 39. Pair Democratic incumbents Fries and Orlett in HD 37, with an enhanced (46.5%) Black population.

Summit/Portage. Another "Democratic" county where Republicans have little opportunity. Usually combined

with Portage Co. for districting purposes. Best thing to do is try and piece together the most Republican areas of both counties into one HD. Hard to do because those areas are scattered and to connect them requires "Democratic"-oriented corridors. HD 69 is such an attempt. It has an index of 46.3.

Lucas Co. Another "Democratic" county where the best option is to concede three safe Democratic districts (HDs 45, 46, 47) while protecting Republican incumbents Karmol (HD 48; Index = 43.6) and Galbraith (HD 70). Inclusion of census tract 65 puts Karmol's residence in HD 48. Enhance Black percentage in HD 45 from 40.2 to 51.8.

Stark/Mahoning. Maximum districts and spillover rules tend to require creation of six HDs out of these two counties combined. Best Republican option is to concentrate Democrats into two safe Mahoning Co. districts (HDs 52 & 53) and one safe Stark Co. district (HD 50). Give Stark Co. Republican incumbents Maier (HD 49) and Ash (HD 50) as low indices as possible. The "spike" of HD 51 (census tract 7132.02B) is to put Ash's residence in this district. Create "Republican" HD 71 from the spillover—one that can be held by incumbent Republican Rep. Johnson. Concentrate Mahoning Co. Blacks in HD 52, with an Afro-American percentage of 35.3.

Lorain. Another "Democratic" county that elected a Republican in 1980 (Rep. Bowman, HD 54) whose retention, without endangering fellow Republican incumbent Tansey, is the problem. Solution is to pack all Democrats possible into HD 55; then divide Democratic areas around Elyria between HDs 54 and 72, constituting each as a marginally "Republican" district (Indices 46.0 and 46.8).

Lake Co. Pack Democrats into HD 60 (Index = 61.1), creating adjoining HD 61 (Index 47.2) where Republicans have an opportunity.

Clark Co. Eliminate Democratic incumbent Hartley by excising Springfield inner city and attaching it to a rural district extending eastward—leaving Hartley in a Clark Co. district with an Index of 39.1

Richland/Erie. Concede re-election of Democratic incumbent Deering of Erie Co. and attach his base to the inner city of Mansfield by a southward-extending corridor into Richland County. This leaves incumbent Democratic Rep. Sherrod Brown (or his successor) in a Richland Co. district with an Index of 45.8, where prospects are not as bright.

Greene. Pair Democratic incumbent Zehner with Republican incumbent Haines in new HD 65 where Haines would have the advantage.

Southeast. Problem here is to enhance prospects for Rep. Ney in HD 99, who won upset victory in 1980 in a "Democratic" district over Democrat Wayne Hays. Best solution is to split Belmont County into four pieces, with the most Democratic townships being attached to HD 96 and HD 98 where there is no prospect of unseating Democratic incumbents Hinig and Bowers. This lowers Index of HD 99 from 53.2 to 47.7. Keep Republican incumbents Ross (HD 78) and Johnson (HD 95) out of each other's districts by splitting Muskingum and Guernsey counties. Protect incumbent Rep. Ball in HD 94 by lowering its index from 40.7 to 37.3. Create new open district by pairing Democratic Reps. Riffe and James in new HD 89.

Southwest and West. Eliminate Democratic incumbent Malott by pairing with Republican incumbent Nixon in HD 77 where advantage is with Nixon. Eliminate Democratic incumbent Locker by pairing with Republican incumbent Netzley in HD 84 where advantage is with Netzley.

[Exhibit 103 to Deposition of James R. Tilling (November 25, 1991)]

District Report for Plan 'planrepo' Senate
Fri Oct 18 08:30:44 1991

Target Population = 0

District	Persons	% NH Bl VAP	% Hisp VAP	% Rep Gov	% Rep Ag
01	34353822	0.52	2.62	64.49	60.09
02	33789970	2.80	1.90	57.25	50.02
03	32469423	6.63	0.89	60.77	60.42
04	33159202	3.62	0.42	63.57	59.03
05	32010155	27.64	0.72	45.40	41.41
06	32586635	2.06	0.62	64.32	59.33
07	33838563	2.84	0.47	68.07	62.27
08	32617416	5.81	0.45	66.95	59.15
09	31557715	43.61	0.68	42.54	37.85
10	32134697	7.79	0.70	62.91	57.60
11	32713835	17.45	3.11	44.69	36.25
12	33113112	3.95	0.64	65.28	59.42
13	34241059	5.52	3.84	55.60	47.37
14	33338199	1.19	0.33	60.14	57.04
15	32501761	32.92	0.95	34.54	35.94
16	32865196	3.65	0.90	60.55	60.98
17	33734399	3.24	0.32	52.47	55.88
18	31392478	1.88	0.79	59.36	48.69
19	32815047	3.55	0.52	61.77	59.03
20	33990782	1.90	0.26	49.56	51.46
21	31905887	60.72	1.38	33.36	20.71
22	32149548	1.82	0.49	64.75	52.91
23	34398920	2.71	4.77	49.71	38.44
24	32873643	0.65	0.77	62.79	48.81
25	32265572	35.93	0.66	44.25	28.02
26	33036892	2.30	1.60	61.48	56.59
27	32866108	3.87	0.47	58.94	47.19
28	32818275	13.65	0.56	49.14	39.72
29	32832214	5.76	0.72	58.32	49.66

Target Population = 0

District	Persons	% NH Bl VAP	% Hisp VAP	% Rep Gov	% Rep Ag
30	32712519	2.14	0.32	49.19	44.28
31	33179306	1.56	0.45	52.96	56.53
32	30894206	4.71	0.49	49.28	43.02
33	33058991	11.17	1.55	45.07	41.52
Averages	32855017	9.87	1.07	55.14	49.29

House to Senate Assignments

Senate	House
01:	82, 83, 86
02:	04, 51, 53
03:	24, 25, 26
04:	58, 59, 60
05:	38, 39, 43
06:	40, 41, 42
07:	02, 36, 37
08:	33, 34, 35
09:	30, 31, 32
10:	73, 74, 76
11:	49, 50, 52
12:	01, 84, 85
13:	61, 62, 63
14:	71, 72, 88
15:	21, 22, 23
16:	27, 28, 29
17:	91, 92, 94
18:	05, 69, 70
19:	79, 80, 93
20:	95, 96, 99
21:	08, 09, 10
22:	07, 15, 81
23:	13, 17, 19
24:	16, 18, 20
25:	11, 12, 14
26:	87, 89, 90
27:	45, 46, 47
28:	44, 48, 75
29:	54, 55, 56
30:	03, 97, 98
31:	06, 77, 78
32:	66, 67, 68
33:	57, 64, 65

[Exhibit 105 (part) to
Deposition of James R. Tilling (November 25, 1991)]

Oct 18 08:22 1991 Page 1

District Report for Plan 'planrepo' House
Fri Oct 18 08:22:33 1991

Target Population = 0

District	Persons	% NH Bl VAP	% Hisp VAP	% Rep Gov	% Rep Ag
01	10975504	10.01	1.00	64.95	58.76
02	11390898	2.53	0.42	68.35	63.39
03	10827598	1.23	0.30	51.83	48.12
04	11326903	1.08	2.07	57.90	52.11
05	9982101	2.79	1.19	51.75	45.79
06	10345102	1.27	0.41	58.12	58.94
07	10144168	1.39	0.35	65.05	58.18
08	10497208	61.19	0.70	34.23	20.63
09	10857253	58.12	0.84	36.25	22.25
10	10551426	63.09	2.69	28.06	18.52
11	10479949	40.43	0.83	42.54	25.41
12	10542387	64.96	0.51	29.21	17.76
13	11485945	2.17	8.82	44.31	34.03
14	11243236	6.83	0.64	56.66	37.37
15	10971395	3.21	0.60	65.11	48.76

• • • •

**[Exhibit 107 to
Deposition of James R. Tilling (November 25, 1991)]**

Franklin
County
Republican

TO: Jim Tilling

FROM: Terry Casey

		Total Population	Black Population	% Black
1.	38 Census Tracts have a Black majority	116,801	88,513	75.8%
2.	33 Census Tracts have 14-48% Black population, most in 25-30% category	97,708	27,496	28.1
3.	Other 181 Census Tracts have	746,928	36,831	4.9
4.	Total	961,437	152,840	15.9

Franklin County Republican Party/Northeast Corner,
North High & East Gay Streets
14 East Gay Street/Second Floor/Columbus, Ohio 43215/224-3939

[Exhibit 120 (part) to Deposition of James A. Tilling (November 25, 1991)]

Reapportionment—1991

Step 1 Total Ohio Population 10,847,115

Ratio of Representation for Ohio House of Representatives

Article XI 10,847,115 ÷ 99 = 109,567
Section 2 Ratio of Representation for Ohio Senate
10,847,115 ÷ 33 = 328,700

Step 2 Totals for ± 5% variance from ideal rate of representation

Article XI Ohio House of Representatives
Section 3 −5% = 104,089 +5% = 115,045
Article XI Ohio Senate
Section 4 −5% = 312,265 +5% = 345,135

Step 3 Determination of number of house of representatives (ratios)

Article XI district within each county
Section 8

1. Cuyahoga	1,412,140 ÷ 109,567 =	12.88
2. Franklin	961,437 ÷ 109,567 =	8.77
3. Hamilton	866,228 ÷ 109,567 =	7.9
4. Montgomery	573,809 ÷ 109,567 =	5.2
5. Summit	514,990 ÷ 109,567 =	4.7
6. Lucas	462,361 ÷ 109,567 =	4.2
7. Stark	367,585 ÷ 109,567 =	3.4
8. Butler	291,479 ÷ 109.567 =	2.7
9. Lorain	271,126 ÷ 109,567 =	2.5
10. Mahoning	264,806 ÷ 109,567 =	2.4
11. Trumbull	227,813 ÷ 109,567 =	2.1
12. Lake	215,499 ÷ 109,567 =	1.97
13. Clermont	150,187 ÷ 109,567 =	1.37
14. Clark	147,548 ÷ 109,567 =	1.35
15. Portage	142,585 ÷ 109,567 =	1.30
16. Greene	136,731 ÷ 109,567 =	1.25
17. Licking	128,300 ÷ 109,567 =	1.17
18. Richland	126,137 ÷ 109,567 =	1.15
19. Medina	122,354 ÷ 109,567 =	1.12

20. Warren	113,909 ÷ 109,567 =	1.04
21. Wood	113,269 ÷ 109,567 =	1.03
22. Allen	109,755 ÷ 109,567 =	1.002

Step 4 — Counties between ± 5% of the ratio of representation for

Article XI — The Ohio House of Representatives

Section 10(A)

Allen	109,755	H.D. #1
Warren	113,909	H.D. #2
Columbiana	108,276	H.D. #3
Wood	113,269	H.D. #4

Step 5 — Counties between 90 and 95% and 105 and 110% of the ratio of representation for the

Article XI — Ohio House of Representatives

Section 10(B)

Ashtabula	99,821	H.D. #5
Fairfield	103,461	H.D. #6
Wayne	101,461	H.D. #7

Step 6 — Cuyahoga—the largest county—draw

Article XI — representative districts—12 complete house

Section 10(C) — districts + .88 of < 13 ±

Display on Screen Minority Population of Cuyahoga County

a) Black
b) Hispanic

Draw Minority Districts

HD 8 1) Start as Cuyahoga River, downtown and go east along Lake Erie until minority population declines. This is HD 8

HD 9 2) From eastern boundary of HD 8 go south and west until we reach acceptable population—come in at between 95 to 99% of ideal ratio. [Includes City of Cleveland (part), East Cleveland, Cleveland Heights (all)

HD 10 3) Continue going west and south back towards the Cuyahoga River [mostly City of Cleveland, 2 tracts—Garfield]

HD 11 4. Return to east and south until population ratio is obtained. [Remainder of Cleveland, Shaker Hts, University Hts]

5. Go south to include remaining black tracts in

HD 12 Garfield Hts, Highland Hills, Warrensville Hts, North Randall, some city of Cleveland, Bedford Hts., Bedford, Maple Hts

HD 13 It may be possible to draw an influence district including remaining blacks and Hispanics. Return west and north toward the Cuyahoga River. Hispanic concentration begins near Lake Erie and tends to go South along or near the Cuyahoga River. Take in what is needed to reach ~95% of ideal size of house district.

This appears to exhaust our possibilities for influence and majority/minority districts.

Draw non-minority districts, beginning at eastern end of Cuyahoga county along the lake

HD 14 Part of Euclid, South Euclid, Richmond Hts., Lyndhurst and Mayfield Hts. Try to go "heavy" on population to make up for "light" majority-minority districts.

HD 15 Continue going south to Southern border of county then west thru Solon, Oakwood, Walton Hills, Valley View, Independence, Brecksville, Broadview Hts. Since this district already touches Medina County and two Senate districts in which it currently nests already includes all of Medina County, we will take the necessary "excess" population from Medina County to complete HD 15. [Hinckley, Granger, Sharon Township in Medina County]

HD 16 Return north to northwest corner of county and begin to move west and south along western boundary of county

HD 17 Go back to North, combine Rocky River, Lakewood and Fairview Park and some city of Cleveland to reach a population on the "heavy" side.

Go to lower southwest corner of county and go east and north avoiding Parma and Parma Hts until we reach a "heavy" population total. North

HD 18 — Royalton, Strongsville, Middleburg Hts, Brook Park, and some City of Cleveland

HD 19 — Go east to continue adding City of Cleveland down into Garfield Hts, etc to fill in area North of Parma and Parma Hts, trying to keep as much of those two suburbs together in the one remaining Cuyahoga county district

HD 20 — Remaining district is most of Parma, Parma Hts, Seven Hills and Brooklyn Hts.

Move to next most populous county—*Franklin*

Display map of minority population distribution

a) Blacks
b) Hispanics

Draw Minority Districts

HD 21 — Start with tracts in the downtown area and go North and east from that location until a "light" majority-minority district population is attained. Avoid primarily white Bexley and Whitehall

HD 22 — Returning to the downtown area, go south of Broad and east to create as close to a majority-minority district as possible. Keep it around 95% of ideal House population total. Avoid Bexley and Whitehall, which are mostly white areas

HD 23 — Beginning on North High Street (approximately), go south and west to build an influence district from the remaining areas of minority population. This district reaches the southern border of Franklin County and include Urbancrest and Grove City.

HD 24 — Move east along the southern border of Franklin County, then north to create a southern and eastern district along the eastern border of Franklin county. This district north from Hamilton and Madison Twps thru Reynoldsburg, far east parts of Columbus city, Jefferson Twp, Plain Township and Westerville.

HD 25 Next, beginning with Bexley and Whiteall, fill in the interior area of the eastern part of the county, including some city of Columbus, Gahanna, and Blendon Twp

HD 26 Moving west along the Northern border of the county, create a district from Minerva Park, thru northern Columbus Sharon Twp and Perry Twp. and pieces of Clinton Twp

HD 27 Come South thru Worthington, Riverlea, Sharon Twp (part) and part of the City of Columbus until population level is attained.

HD 28 Move thru Upper Arlington, Marble Cliff, Grandview Hts and City of Columbus, stopping at border of HD #23.

HD 29 Complete Franklin County districts by filling in western border of county and added needed population (approximately 22,000 people) from Pickaway County.

HAMILTON COUNTY—

HD 30 Starting with majority-minority districts, begin around the downtown area and configure a district including the greatest portion of the eastern segment of black population. Mostly City of Cincinnati

HD 31 Draw second majority-minority district, using areas of black population Bordering the area around the University of Cincinnati and northward

HD 32 Create an influence district by joining together the remaining concentrations of black population including some City of Cincinnati and selected suburbs.

HD 33 Moving West along the southern border of Hamilton county including the balance of western Cincinnati and adding Delhi Twp (part) until population level is attained

HD 34 Continuing up the western border of Hamilton county to the Butler County line then east until the population level is achieved at Colerain Township border

HD 35 Beginning with Colerain Twp, continue east around the existing borders of the influence district (HD 32) until the population limit is reached trying not to split political subdivisions. District includes Springdale, Evendale, Reading, and part of Glendale.

HD 36 Continuing east to the eastern border of Hamilton Co then south thru Sharonville, Blue Ash, Montgomery City, Symmes Twp, Amberley Village, Deer Park, Sycamore Twp, Indian Hill, Madeira, Mariemont Village, Fairfax Village, Terrace Park Village, etc to the Anderson Twp line.

HD 37 Complete Hamilton county by adding Anderson Twp, City of Norwood and eastern areas of Cincinnati

MONTGOMERY COUNTY

Display minority population distribution patterns on screen

a) Blacks
b) Hispanics

Draw Minority Districts

There are currently two black state representatives in office, examine the minority areas and attempt to maintain the existing majority-minority district (McLin) and preserve the influence/minority district now held by Tom Roberts

HD 38 Starting with Jefferson Twp in Southwest corner of minority area move north and east until a majority minority district is created.

HD 39 Continue to the north in the city of Dayton and enough to create an influence district with the highest possible minority vote. Take in Madison Twp, Trotwood, portions of Harrison Twp

Draw the remaining non-minority districts

HD 40 Start in northwest corner of county, come east, includes Clay Twp, Perry Twp, part of Madison Twp, Randolph Twp, Butler Twp, Vandalia city and some of Harrison Twp. Add city of Englewood. Take some of Huber Heights, but leave a surplus to attach to Miami County to complete the two Senate districts allotted to Montgomery. [Miami County is currently in SD 5]

HD 41 Moving south along the western border of the county and then east to obtain required population, add in Jackson Twp, New Lebanon city, German Twp, Jefferson Twp (part) Miami Twp, West Carrollton, Moraine and a part of Kettering.

HD 42 Complete balance of county (except for corridor to Miami county noted above) by combining Washington Twp, Centerville city, Oakwood, Kettering (part) and part of Mad River Twp.

HD 43 Remainder portion goes into Miami County (part) and is numbered HD 43.

SUMMIT COUNTY

Display minority population distribution on screen.

a) Blacks
b) Hispanic

HD 44 Currently, Summit County has one black state representative, Vernon Sykes. Try to maximize the minority voters in his district. This includes city of Akron, Wards 2, 3, 5 and parts of 1, 4 and 10.

HD 45 Beginning at the northeastern border of Summit county and going West and South, include the northern townships, Fairlawn, Macedonia, Bath,

Copley and city of Akron, Wards 8 and 4 (part) etc.

HD 46 Beginning south of HD 45, include Hudson Village and Twp, Stow, Silver Lake, Monroe Fall, Cuyahoga Falls, part of Ward 1 in Akron

HD 47 Beginning in Barberton, add parts of the city of Akron, Ward 10 (part) and Wards 6, 7 and 9.

HD 48 Complete balance of Summit County, including Green Twp, Tallmadge, Mogadore, Lakemore, Coventry, Franklin, Springfield, Brimfield, Randolf, Rootstown, Suffield and approximately 30,000 from Portage county

LUCAS COUNTY

HD 49 Currently, one black incumbent State Representative Casey-Jones. Draw minority district first, based upon minority population distribution display.

Start downtown, go west following black population concentration to Ward 6 then back to downtown and then south to add Hispanic voters.

HD 50 Start in East Toledo, then go north to Maumee Bay, then west taking in parts of the city of Toledo and Washington Twp

HD 51 Begin in southwest corner of county and move north and east including suburbs until population limit is reached.

HD 52 Fill in balance of city of Toledo between HD 51 and districts 49 and 50.

HD 53 The remainder portion, city of Oregon, Harborview Village and Jerusalem Twp are given same in HD 53 and will be combined with Ottawa & part of Erie county or counties.

* * * *

[Exhibit 132 (part—page 1) to
Deposition of James R. Tilling (November 25, 1991)]

REPUBLICAN
NATIONAL
COMMITTEE

Benjamin L. Ginsberg
Chief Counsel

Mr. Jim Tilling
Chief Executive Officer
Ohio Senate
State House
Columbus, OH 43266

Dear Jim:

Thanks very much for agreeing to speak on the seminar panels on Friday, February 8, 1991 beginning at 2:15 p.m. in the Colonial Room at the Mayflower Hotel, 1127 Connecticut Avenue, N.W. and again on Saturday beginning at 9:00 a.m. (not 8:30!).

As I mentioned, it would be most helpful if you could appear on the panel discussing what steps should be taken to build the record concerning redistricting in a legislature. Building the record is obviously one of our most crucial tasks over the next few months. There is, as you know, no way to understate the importance of a solid record to successful litigation down the road. Any bills you have introduced, or procedures proposed or policies for making state-funded redistricting tools available would be most relevant. I am particularly interested in the Legislator's approach to the subject. We will also have a lawyer or two on the panel, I hope.

On Saturday, the panel concerns the lawyers role in drafting redistricting plans. As a wiley veteran of this process, please let these guys know how they can help

the most without overstepping their bounds (as if a lawyer would ever do that). There will also be a couple of lawyers on that panel.

As you know, we have invited key Republican legislators and attorneys from all 50 states to this seminar. I have enclosed a draft agenda. We're excited about this seminar and pleased that you'll be joining us.

Thanks again for agreeing to address this group. If you have any questions, please call. We look forward to seeing you on February 8 and 9.

Sincerely,

/s/ Benjamin L. Ginsberg
BENJAMIN L. GINSBERG

Dwight D. Eisenhower Republican Center:
310 First Street, Southeast, Washington, D.C. 20003

DEPOSITION OF FLOYD JOHNSON
(November 27, 1991)
[Docket #73]

[9] MR. GILLIAM: Would you mark that, please, as Johnson Exhibit 1.

(Exhibit marked for identification.)

Q. Can you tell me what this is, sir?

A. That is a set of recommendations to the Ohio Reapportionment Board for minority influence districts and minority districts.

* * * *

[12] Q. Mr. Johnson, was this plan approved by the national NAACP?

A. No.

Q. Was it approved by the general counsel of the NAACP?

A. No.

Q. Was it approved by Mr. Abrams, who is here with you today as the assistant general counsel of the NAACP?

A. No.

Q. Did you submit it to them?

A. No.

* * * *

[20] MR. GILLIAM: The document that Mr. Johnson has produced appears to be a map of precincts in Montgomery County. Would you mark that, please, as Exhibit No. 3.

(Exhibit marked for identification.)

[21] Q. Mr. Jacobson gave you a copy of this map; is that correct?

A. That's correct.

Q. And did you know at the time that he was the chairman of the Republican party here in Dayton, Ohio?

A. I did know.

* * * *

Q. Now, what else did Mr. Jacobson do besides provide you this map?

A. There should be a handwritten comparison—

MR. ABRAMS: Near the bottom of the package.

A. There is a copy of this somewhere.

Q. I have a copy of it.

A. I presented a set of districts for both the districts where Rhine McLin is elected from and Tom Roberts are elected from. And he had a set of districts and I indicated that the district that he had included—this H represents Representative Hickey and during our discussions he indicated that if these districts were—if these two persons were in this district then based upon his assumptions here the vote would turn out 13 to 11, 13,670 to 11,670 representing to me that by moving the district that Representative McLin lives in from extending southward and extending into the eastern [22] part of the city, that she would not be hurt.

* * * *

(Exhibit marked for identification.)

Q. It's handwritten. Now on which part is your part and which part is Mr. Jacobson's parts?

[23] A. My part is represented—this yellow portion here that comes over and takes in Ward 1, this cuts off here and picks up what I call the University of Dayton area and then westward and then southward which still included the cities of Moraine which are currently in the district was my first cut. And then Mr. Jacobson suggested that I take Moraine out and move over and pick up more of the state and ask me did I have any objections to that and then I called a meeting with Rhine McLin and Tom Roberts and discussed the first cut.

MR. GILLIAM: We're referring to a large map which I would ask the court reporter to stop and mark.

(Exhibit marked for identification.)

Q. Referring now to Exhibit 5, Mr. Johnson, as I understand your testimony Mr. Jacobson suggested that Moraine, that you substitute portions of east Dayton which is the area east of the river and east of the Univer-

sity of Dayton area Nos. 33, 26, 27, 25, 20, and 23 for the Moraine area which would be 43, 42, 41, perhaps 43; is that correct sir?

A. That's correct.

Q. And did you ultimately—then you talked to Mr. Roberts and you talked to Rhine McLin?

A. Right.

Q. And did you say that was what Mr. Jacobson had [24] suggested?

A. That's what he suggested.

* * * *

[25] Q. And his recommendation would have resulted with Mr. Hickey being in her district if it had been accepted as he proposed it; is that correct?

A. At that time that we drew the district he didn't know what his address was, but once we agreed that we did not want him in the same district with Rhine McLin then we both agreed that we would take him out of the district that Rhine McLin is represented at this time.

Q. So you had to redraw the district to take him out; is that correct?

A. That's correct.

Q. Now, did Mr. Hickey tell you why he suggested that this area of east Dayton be included in Rhine McLin's district?

MR. DELONE: You mean Mr. Jacobson?

A. Mr. Jacobson.

Q. I'm sorry, strike that. Did Mr. Jacobson tell you why the area of east Dayton should be included in Rhine McLin's district?

A. He said he wanted his Republicans in this other part.

[26] Q. Did he tell you why that would be helpful to him?

A. Well, being a chairman of the Republican party, I didn't have to ask any more questions.

Q. You kind of figured that out.

A. Yeah.

Q. You accepted this portion, that is you Floyd Johnson, accepted this portion of east Dayton as part of your map, is that right?

A. Proposal, that's correct.

Q. And in essence, after taking out Mr. Hickey, went along with Mr. Jacobson in terms of what he wanted at that time, correct?

A. That's correct.

Q. You realized that there were 3 to 2 on the Apportionment Board sitting in Columbus, 3 being Republicans and 2 being Democrats, is that fair?

A. I can count.

• • • •

[27] Q. Are you aware, Mr. Johnson, that all of the elected legislators in the Ohio legislature are Democrats who are minorities?

A. I am aware.

• • • •

[28] Q. Did you look at Mr. Hickey's voting record on minority issues before you agreed with Mr. Jacobson about how the district should be redrawn?

A. I did not.

• • • •

[29] Q. Did you check the voting record of any of the legislators whose districts were redrawn?

A. I did not check their voting records because we were drawing districts for election of legislators.

Q. That's right. Did you check the voting records of any of the legislators?

A. I did not.

• • • •

[30] Q. Mr. Johnson, I'm not sure the record is clear. Let me just repeat the question.

Is it correct that you did not check the voting records of any legislators in connection with redrawing or proposing to redraw districts. Is that a correct statement?

A. That is correct.

Q. And why not?

A. My interests were to draw districts where African American legislators could be elected. That is second generation legislators.

Q. Mr. Johnson, is it possible for white candidates to adequately support black interests and black candidates to support white interests?

A. That's correct.

• • • •

[32] Q. Did Mr. Tilling ever tell you what his proposals were going to be for the districts which would result if the plan you proposed were adopted?

A. He did not.

Q. Did you ever ask him?

A. I presented my plan to him.

[33] Q. I'm asking you a question. Did you ever ask him, Mr. Tilling?

A. No, I never asked him.

Q. Again, why not?

A. It wasn't important to me.

Q. It wasn't important to you?

A. No.

• • • •

Q. Did you know that in Hamilton County as a result of the plans that were adopted by the Republicans [34] and which is in conformity with your plan, that the blacks have two districts which they've been increased and there are six districts in which they are less than 10 percent. Did you know that fact?

A. After the plans were submitted.

• • • •

[35] Q. Then why is this plan for the '90s something that you should decide he should have—strike that.

Why did you decide that for the '90s Representative Mallory should have more blacks in his district?

A. Well, I didn't look at the district as Representative Mallory's district. I looked at it as the legislative district that would give a minority an opportunity to be elected.

Q. Did you evaluate how much white cross-over vote there was for Representative Mallory?

A. Yes.

Q. You did? What did you determine?

A. That he was getting white cross-over vote.

Q. Substantial amount of it, true?

A. Yes. He was being elected after being in the legislature for twelve terms.

Q. And it's your assumption that white cross-over vote would disappear if Representative Mallory was not there?

[36] A. No, my assumption was that incumbency has and name recognition has value.

* * * *

[43] Q. Yes. Did you have a conversation with Mr. Tilling about that?

A. I had conversations with him probably every other day.

Q. During what period of time?

A. From April 12 through the time that the—I actually received the payment.

Q. When was the first payment made to you?

A. I'd have to go back and check my calendar. I didn't bring that information, but it wasn't made prior to the date on this contract.

Q. So you received no money before October 6, is that right?

A. That's correct.

Q. But you did receive money for work that you had done before October 6; is that correct?

A. Yes, that's correct.

* * * *

[46] Q. And Mr. Jacobson—did Mr. Jacobson work with you on any place other than Dayton, Ohio?

A. Yes.

Q. Where did he work with you?

A. He didn't work with me. He made suggestions to see whether or not I would agree to those suggestions on Cuyahoga County.

* * * *

[59] Q. And do you know what regression analysis is?

A. Say again.

Q. Do you know what regression analysis is?

A. No, I do not.

[60] Q. Did you do any racial block voting analysis?

A. Racial block voting analysis?

Q. Yes.

A. In Montgomery County I didn't need to do racial block voting analysis because I've been involved in politics since 1966. So I have collected voting results since 1966.

Q. Had you collected voting results for any place other than Montgomery County?

A. With the exception of the document from Hamilton County, 1990, no.

Q. Did you do any—do you know what the term "racial block voting analysis" means, bivariant regression analysis, statistical formula?

A. It's pretty easy to figure out. Using those terms, I never used that term before.

Q. Did you do such a statistical analysis at any time, Mr. Johnson?

A. No.

* * * *

[68] Q. In connection with your work on the computer where you were actually drawing the maps, did you get any help or any suggestions from Mr. Jacobson? We talked Montgomery County but anyplace else?

A. Nothing that—he had different ideas and would try to influence me on those and I listened to him, but I prepared those districts. On some occasions I had to schedule a time at LSC and then change it so I wouldn't be bothered with it.

Q. You mean he was pursuing you at LSC?

A. Yes.

Q. Trying to?

A. Very ambitious.

Q. Very tenacious, is that what you said, very tenacious?

A. Very, very.

Q. And he made suggestions to you about Hamilton County, is that correct?

A. Not really. He was not familiar with Hamilton County and he couldn't speak, you know, he couldn't make [69] any suggestions. He looked at what I said and he would make statements like I think you could get more in there. That might be the extent of it.

Q. And meaning more black population?

A. Yes.

MR. DELEONE: Are we talking about Jacobson now?

THE WITNESS: Jeff Jacobson.

Q. Did he say words to that effect with respect to Hamilton County districts that you were drawing for example?

A. That's correct.

Q. Franklin County?

A. Yes.

* * * *

[70] Q. And was your purpose to increase the black population in the districts you were drawing generally speaking?

A. That was my purpose.

* * * *

[73] Q. And is that what you thought Mr. Miller was doing was working with you as liaison, is that right?

A. No. He represented to me that the Ohioans for Fair Representation, and these are his exact words, sent me to watch you.

Q. And what did you understand that was all about?

A. Keep up with what I was doing in terms of drawing districts.

Q. Now, did he in fact do that?

[74] A. Yes.

Q. On each district as you drew it?

A. No, just whenever he could catch up with me.

Q. Just whenever he could catch up with you?

A. Right.

Q. So he was observing what you were doing when he could catch up with you.

A. That's correct.

Q. On all the districts that you drew; is that correct?

A. That's correct.

Q. What did you think Ohioans for Fair Representation was?

A. I found out that there was such an organization at the final meeting when we had to submit plans.

Q. Well, you just said Mr. Miller said, "Ohioans for Fair Representation sent me to watch you." Now, did he say that before the plan?

A. He said that before but since that time I found out that there is such a thing as Ohioans for Fair Representation, but I assumed that he was a part of Montgomery County Republican party until at the hearing, as I indicated to the panel, that they asked me had I worked with anybody for Ohio, and no, and Jeff came forward and said, "I am Ohioans for Fair [75] Representation," that's when I found out that there was such an animal.

* * * *

[107] Q. Let me ask you this, did you ever make any attempt to find out if any of the white Democrats were representing minority interests consistently in their vote?

A. I know they do. I know Leo Zimmers does a good job.

Q. Did you look at the House of Representatives to make any determination of that fact.

A. No, I didn't do an analysis on white representatives. My focus was on getting blacks elected.

Q. In retrospect would it have been wise to do that to see what your voting plans would do to those white Representatives?

A. It would have been good to know the [108] information.

* * * *

**[Exhibit 7 to
Deposition of Floyd Johnson (November 27, 1991)]**

[Illegible]

August 21st 1991

James Tillings
Chief Executive Officer
Ohio State Senate
Statehouse
Columbus, Ohio 43266

Dear Mr. Tillings;

Please accept this correspondence as the framework for a mini consulting agreement to provide working capital for me to access the technical information and computerized data available on the terminals in Columbus. My specific objective will be to look at minority dictricts and influence districts for Congressional, Senatorial, and House of Representatives.

I will:

a.) Research and minipulate population data in voting tracts in Cuyahoga,, Franklin and Hamilton Counties for Congressional Redistricting of Ohio's nineteen district delegation to the next Congress. My goal would be to determine how minority voters could maximize their influence and assist in drawing districts within the framework of the Voting Rights Act.

b.) Research on the possibility of State Senate districts and influence districts for Minorities living in Franklin, Montgomery, Hamilton, Lucas and Cuyahoga Counties.

c.) Minipulate lines for new Ohio State Representative districts in those counties where their is significant minority voting population. The total contract amount for this report is $7,800 for a total of 260 hours at a rate of $30.00 per hour.

I will prepare a written report on research work along with an invoice. However, since the clock is already running and recognizing the importance of this project to the minority population of the State of Ohio. I am requesting that should you approve this agreement please foward 25% ($1,950.00) of the contract to cover certain out of pocket expenses such as;

a.) Transportation to and from Columbus, Cincinnati and Toledo

b.) Purchase of large Precinct, Census tract and Ward Maps of these Counties.

c.) Purchase of computer time to plot voter registrations and voter turn out in the targeted districts.

d.) Purchase of miscellaneous disc paper and supplies.

e.) Purchase postage and express mail and telephone tolls for this short term project.

Thank you for the opportunity to work with you on this project.

Sincerely,

/s/ Floyd B. Johnson
FLOYD B. JOHNSON

cc. Jim Daniels, State President NAACP
Jesse Gooding, President Dayton Chapter NAACP
Frank Allison, President Cincinnati Chapter NAACP

DEPOSITION OF STANLEY J. ARONOFF
(November 27, 1991)
[Docket #75]

[5] STANLEY J. ARONOFF

being by me first duly sworn, as hereinafter certifed, deposes and says as follows:

EXAMINATION

By Ms. Sanom:

Q. Will you please state your name and address for the record.

A. Stanley J. Aronoff, 554 Davenport, D-A-V-E-N-P-O-R-T, Apartment 5, Cincinnati, 45204.

Q. And, Mr. Aronoff, what is your current occupation?

A. I'm president of the Ohio Senate and I also am a member of the law firm of Aronoff, Rosen & Stockdale.

Q. Here in Cincinnati?

A. Yes.

Q. How long have you been an attorney?

A. Since 1957.

* * * *

[10] Q. (By Ms. Sanom) Senator, you indicated that you were one of the persons appointed for the 1991 apportionment process; is that correct?

A. Yes.

* * * *

Q. To your understanding what were your duties or responsibilities as a member of that group of five persons?

MR. DELEONE: Same objection. You may answer.

A. The duties were to accept plans that were [11] submitted by any person that desired to submit a plan within certain time frames, to establish rules for the submission of plans, to permit public hearings, to delegate, and ultimately to vote for a plan of apportioning state legislative districts.

Q. You mentioned to delegate. To delegate what?

A. In my instance I delegated almost everything to Jim Tilling, the chief operating officer of the Senate, who traveled the state conducting hearings, doing research, and ultimately being the expert in the line drawing, district drawing process.

• • • •

[15] Q. Thank you. Did anyone on your staff communicate with or give direction to Mr. Tilling at your instruction?

MR. DeLEONE: If you know.

A. No. I gave no instructions to anyone on my staff.

Q. With respect to the Voting Rights Act, did you give any specific direction?

A. No.

• • • •

[16] Q. So with the United States Constitution, Ohio Constitution, Voting Rights Act, the new techniques, you gave no specific direction.

A. That's correct.

• • • •

[29] Q. Prior to hearing Mr. Tilling's presentation did you speak with him or with anyone about the conclusions he had drawn, the lines he had drawn or what his presentation was going to be?

A. No.

• • • •

[35] Q. I'm just going to ask you a series of questions and we should be able to get by them quickly.

Are you aware of whether or not a racial block voting analysis was done in Ohio?

MR. DeLEONE: By whom?

MS. SANOM: By Mr. Tilling or his staff.

A. I don't know one way or the other.

Q. Are you aware of whether or not a correlation of regression analysis was done by Mr. Tilling and his staff in Ohio?

A. I don't know one way or the other.

Q. Are you aware that Mr. Tilling and his staff looked at black voting patterns in areas of high concentration of African American populations?

A. I'm not aware one way or the other. I had nothing to do with the mechanics.

* * * *

DEPOSITION OF ROBERT A. TAFT
(December 9, 1991)
[Docket #110]

[8] Q. Are you aware, sir, that Mr. James Tilling drew the 1991 apportionment plan for the Republican majority of the apportioning persons?

A. It is my understanding that Mr. Tilling was the principal architect of the plan.

• • • •

[16] Q. Was Mr. Tilling to report to anyone on the Apportioning Board?

A. Not to my knowledge.

Q. Okay. Do you know if there was a method for monitoring his progress by anyone on the Apportionment Board?

A. I don't recall any method for monitoring his progress. It was assumed that he would come up with a plan timely to present to the Board by the deadline.

• • • •

[17] Q. What issues were you concerned with?

A. We were concerned with the requirements as I understood them that, under the Voting Rights Act and court cases pursuant to the Voting Rights Act, that where it would be possible to create a district that was a majority minority district, the law and the court interpretations of the law required that the plan create such districts.

• • • •

[18] Q. So one of your primary goals was to create majority minority districts wherever possible in the State of Ohio?

A. I felt that the goal was to comply with the Constitution and Voting Rights Act, and it required creation of districts that would have—where you could assemble a district that was a majority of a minority, and that that was required under the Voting Rights Act.

Q. So wherever that was possible you wanted that to be created. You wanted majority minority districts to be created wherever possible.

A. Yes. I felt that was a requirement of the constitutional plan.

Q. Are you an attorney?

A. Yes.

Q. Where did you receive your law degree?

A. University of Cincinnati.

Q. When was that?

A. In 1976.

Q. Have you studied the law on this issue to make the determination that majority minority districts are to be created wherever possible?

A. I am not a student of the reapportionment [19] process, but it was my understanding that that was the requirement, that was the gist of the court cases pursuant to the Voting Rights Act.

Q. Did you read the cases or did somebody inform you of that?

A. Someone informed me of that.

Q. Who?

A. I think Mr. Tilling, among others, based on his participation in national bodies and national commissions with respect to the reapportionment process.

I also recall reading the Armour case in which I believe there was some discussion of the majority requirement for creating minority districts.

• • • •

[21] Q. Okay. Are you aware of any analysis that was done with respect to racial block voting in the drawing of the 1991 apportionment plan?

A. No.

Q. You never saw any analysis?

A. No.

Q. Never heard any analysis?

A. No.

Q. You never discussed that with Mr. Tilling?

A. I did not.

Q. Senator Aronoff or Governor Voinovich?

A. I did not, not that I recall.

Q. Do you know if that is necessary under the Voting Rights Act in creation of majority minority districts?

A. I don't—I can't say if it is necessary. Certainly it was—I think in some of the hearings it came up as to what it required, what was required to elect a minority candidate in a particular district. I know there was testimony with respect to that. So from [22] that standpoint I assumed it may be a pertinent factor, but I can't tell you for sure.

Q. And what testimony are you referring to generally?

A. I think there may have been some testimony on the part of—I can't recall who, but perhaps some incumbents with respect to the percentage, composition of a district in terms of what percentage minority it was and whether it had the capacity or the practice of electing a minority candidate.

Q. And were you aware from those hearings that there were at least seven representatives of color who had been elected with less than a majority of minorities in their district?

A. I was aware there were some. I didn't know the number.

Q. Do you know whether or not that was factored into the analysis in creation of majority minority districts for Ohio, for the 1991 plan?

A. I can't say for sure.

• • • •

[25] Q. Okay. And Mr. Tilling was to in his own analysis make those determinations and—

A. That's right, yes, since he was something of an authority on reapportionment, knowledgeable about it.

• • • •

Exhibit 6 to
Deposition of Louis W. Blessing, Jr. (December 10, 1991)]
[Docket #106]

[SEAL]

DEPARTMENT OF JUSTICE

REMARKS OF

JOHN R. DUNNE
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE
NATIONAL CONFERENCE OF STATE LEGISLATORS
CONCERNING

"REAPPORTIONMENT"

ON
AUGUST 13, 1991
ORLANDO, FLORIDA

It's a distinct pleasure to address this conference on reapportionment—a topic which has special meaning to me both in my present position and as a former State Legislator who served a good long time in the New York State Senate. I remember well, having to endure with anxiety what seemed like an interminable wait while the practitioners of the Arcane Science—electoral redistricting—performed their mystical handiwork and determined my political survival. The outcome, as you well know, could, and did, cost a fair share of officeholders their jobs. I was first elected during a special election held to implement a redistricting plan required by the Supreme Court's "one-man-one-vote" ruling. Later, I watched—often quite nervously—as my district was repeatedly redrawn to reflect the results of both the 1970 and the 1980 Censuses. Thus, although I now play a very different role, I have not forgotten what it's like to be in your shoes as you prepare for the Legislative and Congressional redistrictings that lie ahead—a task which, due to legal and technological developments, is perhaps the most difficult and controversial that it has ever been. To help you in that process—and keep in mind, I am from Washington and I'm here to help you—I want to talk about the Civil Rights Division and our role in enforcing the Voting Rights Act.

The Voting Rights Act, was enacted over 25 years ago in response to a long and sorry history of oppression of racial minorities, was passed for one very special purpose: to eliminate the cornerstone of that system of oppression by outlawing all racially discriminatory voting rules, so that minorities in this nation would be able to attain their fair share of political power and thereby gain the ability not only to protect themselves from other forms of oppression but to advance their interests through the political process, as well.

There are two sections of the Voting Rights Act which have a direct impact on the redistricting process and, by

their combined effect, require compliance by every state in the union:

First, under section 5—the preclearance section—redistricting plans from certain specific states [1] or local jurisdictions [2] must be reviewed—either by a three-judge federal district court in Washington or by the Department of Justice—to determine whether the state has proven, as it must, that the plan satisfies the mandate of the Voting Rights Act, namely, that it be free of racially discriminatory purpose and effect. Following the 1980 census, we interposed section 5 objections to and refused to preclear 24 statewide congressional and legislative redistrictings. Most of the objections involved the dilution of minority voting strength through either the fragmentation or the packing of a politically cohesive and geographically concentrated racial or language minority, coupled with the state's failure to prove that the dilution was not motivated, at least in part, by a racially discriminatory purpose. In not one instance has the three-judge court reversed a preclearance objection issued by the Justice Department. Thus, experience has clearly established that covered jurisdictions must satisfy the civil rights division that their redistricting plans comply with the statutory and constitutional requirements for facial fairness *before* they can put them into effect. As a result, section 5 has proven to be a potent weapon in fighting racially discriminatory reapportionment plans.

I should also tell you that if a jurisdiction were to commence a declaratory judgment action before a three-judge

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[1] Covered states are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. In addition, New Mexico is covered by the preclearance requirement of Section 3(c) as a result of litigation successfully challenging its post-1980 legislative redistricting plan.

[2] Certain counties in the following states are covered: California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota.

federal district court in Washington, D.C. in order to secure pre-clearance, rather than following the conventional, quicker, and less formal procedure of administrative pre-clearance, we would treat the action as we would any adversarial proceeding. We would be prepared to engage in extensive discovery, including interrogatories, requests for production of documents and depositions. We would force the state to meet its burden of proof at trial, subject its witnesses to extensive cross-examination, put on our own witnesses and experts and, in short, litigate the case to the fullest extent necessary to make certain that the submitting jurisdiction met its burden under the law.

With those basic principles in mind for section 5 pre-clearance, let us look at section 2 of the Voting Rights Act which requires that all redistricting plans across the country—not merely in those that are subject to section 5—provide minority citizens with equal opportunity to participate in the political process and the opportunity to elect representatives of their choice. As congress made clear in the 1982 amendments to the Voting Rights Act, and as the Supreme Court reiterated in 1986 in *Thornburgh* v. *Gingles* when it first construed those amendments, this means that proof of intentional discrimination is not required to vitiate a plan—a redistricting plan violates the Voting Rights Act if it simply has a discriminatory result. Thus, the relevant legal standard today is whether the redistricting plan results in discrimination, even if those who drew and approved the lines had no discriminatory intent and thought they were creating districts that were fair to all minorities. Either infirmity, discriminatory purpose *or* discriminatory result, is sufficient to condemn a plan. Clearly, then, the difficulty of the redistricting task is immense and we in the civil rights division stand ready to help you in any way we can in this effort.

Let me turn first to some practical considerations in the administration of the Voting Rights Act. Our best estimate is that the department will receive over 1,000 submissions of redistricting plans before the end of this year, with an even greater number in the years that follow. At the same time, we plan to exercise our authority under section 2 and examine plans adopted in states that are not subject to section 5 review. Although redistricting in response to a decennial census is hardly new, the process, this time around, is unlike any other we have seen, due to all of the legal, social and technological advances that have occurred during the past decade. In preparation for reviewing these plans, we have acquired the most up to date, state of the art computer hardware and software. Thus, we are prepared to handle what could be an avalanche of complex proposals. In addition, we have a seasoned team of voting rights experts, led by two veterans each with 30 years experience, who have been through two rounds of decennial redistrictings. Thus, we have the troops and the equipment to take on what might be dubbed: "redistricting storm"!

Let me just note a few of the changes that will affect virtually every reapportionment plan in the nation.

First: In most parts of the country, the question is no longer whether the voices of racial and language minorities will be heard in the redistricting process. They will. As a result of the progress that has been made since the passage of the Voting Rights Act, black, hispanic an other minority legislators have taken their rightful place firmly in the legislative halls that will fashion the political boundaries for the 1990's. Consider that in 1970, only 1,469 blacks held elective office. By January of 1990 there were five times that number of black elected officials in this country. We have already seen from early submissions that the input of minority legislators and their constituents affected redistricting proposals

and alternatives as they were developed and examined and debated.

Second: Due to the wonders of computer technology, legislators, as well as those ouside the legislative process, will have a much wider selection of alternative districting plans than in the past. These alternative plans will be susceptible to faster and more specific political analysis, not only by legislative players, but also by those players on the outside trying to influence the process. Everyone involved will have access to more knowledge about the political and racial implications of every redistricting option. And the states must be prepared to explain and defend their plans in light of that heightened scrutiny. That means justifying their rejection of certain alternatives as well as the adoption of a specific plan. Every group or any concerned citizen with a home computer and basic software will be able to draw its own alternative plan. Moreover, all will have access to sophisticated programs and illustrative graphics ready to reveal the political and minority impact of every permutation that you do—or do not—consider. Move a district line one block north or one block south and I assure you that someone will have a color chart and tables of statistics to show the impact. And you'll see similar presentations analyzing the failure to move that same district line one block North or South.

Third: The substantive standards for enforcing section 5 clearance of the voting rights act have become clearer. We have gone through two sets of decennial redistrictings under the Act and have received guidance from the courts on how the 1982 amendments to section 2 apply to redistricting plans. The Supreme Court's landmark decision in *Thornburg* v. *Gingles* provides exhaustive guidance on interpreting the Voting Rights Act. And in 1987, the department issued guidelines under section 5 detailing the substantive standards we apply.

Basically, these guidelines set forth three inquiries that we pursue in our section 5 analysis. First, we ask whether the jurisdiction has met its burden to prove that the plan does not have a retrogressive effect, that is, that the plan does not reduce minority voting strength from the level that minorities enjoyed under the prior plan. As a practical matter, we see few if any plans that are retrogressive.

Second, we ask whether the jurisdiction has proven that the plan was not motivated, in whole or in part, by a racially discriminatory purpose. Because the concept of discriminatory purpose is so central to our work, let me pause here for a minute and explain what I mean. A discriminatory purpose means a design or desire to restrict a minority group's voting strength, that is, the ability of that group to elect candidates of its choice, below the level which that minority group might otherwise have enjoyed. Discriminatory purpose does not mean racial animus. As Judge Kozinski of the Ninth Circuit noted in the *Garza* case, legislators who harbor no ill will at all toward minorities would nevertheless be engaging in purposeful discrimination if they fragmented a minority community in order to protect incumbents who might be voted out of office if the minority voters were able to elect the candidates of their choice.

On the other hand, discriminatory purpose does not mean the intentional adoption of a plan that gives a minority group control of less than a proportional or maximum number of districts. A minority group is not automatically entitled to a proportional redistricting plan. Disparate effects alone, even when they are totally foreseen, do not equal discriminatory purpose under section 5, although they may be a problem under section 2.

Disparate effects, however, do need to be explained in a section 5 submission so that we can be sure that the state has satisfied its burden of proving the absence of

racially discriminatory purpose. If, for example, a minority group's proposed plan is rejected, we must be satisfied that the jurisdiction made its decision for a valid, non-racial reason and that the plan was not rejected because it was favorable for the minority group.

Third, we ask whether the jurisdiction's plan clearly violates section 2 of the act under the standards set forth by congress and the courts.

Without attempting to be exhaustive, let me just outline for you some of the redistricting practices we look for in deciding whether there may be a violation of the Voting Rights Act:

1. Packing a racial or ethnic minority group into only one district where that minority might have been able to elect candidates in two or three less concentrated districts.
2. The obverse side of that issue: fragmenting or splitting a geographically compact minority group into 2 or more districts where they will constitute an electoral minority.
3. Reducing the percent of minorities in a district where the minority voters have previously been able to elect candidates of their choice by only a very slim margin.
4. Maintaining the re-election chances of those in control of the redistricting process by preserving the old district lines to the greatest extent possible at the expense of minority voters.
5. Altering district boundaries to shore up, for the majority group, previously marginal or competitive districts where minority voters were almost, but not quite, able to elect a preferred candidate.
6. In open districts, where there is no incumbent, drawing the boundaries of the district so that the

minority group is at a distinct disadvantage in electing its preferred candidate.

7. Inexplicably deviating from the redistricting criteria that the state claims it used in drawing the boundary lines.

8. Excluding minority groups from the process of drawing the plan, or merely paying "lip service" to them by soliciting, but then ignoring, the minority group's input and then providing no rationale for rejecting the minority group's redistricting proposal and, finally,

9. The unexplained or arbitrary use of multimember districts.

This is neither a hard-and-fast list nor an exhaustive one. I offer it merely as a helpful guide in evaluating redistricting plans. Many plans that suffer from one or more of those indicators may be accepted; but the presence of too many should lead you to re-examine the impact that a proposed plan may have. It is my hope that the states will insist that any plan submitted to them for consideration complies with the Voting Rights Act.

Let me describe some recent decisions that we have made under section 5 which illustrate how we apply the principles I have just outlined.

In Louisiana, the proposed maps for the state house and senate fragmented black population concentrations in two areas in the senate and seven in the house, despite proposals by the minority community that would have kept those concentrations intact and created viable minority districts. We interposed an objection because our analysis revealed that, on balance, the evidence as to each of these areas suggested that the legislature's decisions had been motivated by a desire to protect incumbents at the expense of minority representation. Ob-

viously, protecting incumbents is not illegal in and of itself, but the law is clear that it is not a valid reason for rejecting feasible alternatives that would give minority voters an opportunity to elect candidates of their choice. Again, as Judge Kozinski noted in the *Garza* case, "where, as here, the record shows that racial or ethnic communities were split to assure a safe seat for an incumbent, there is a strong inference—indeed a presumption—that this was the result of intentional discrimination . . . ." [3]

But these calls can be close ones. In another area of the Senate plan in Louisiana we did not object to the state's rejection of a proposed minority district in Jefferson Parish. It appeared that, among other things, the proposed district would have had an odd, somewhat tortured shape: its creation would have divided the community of Algiers among three districts, even though Algiers had traditionally been maintained in a single district and the people of Algiers wanted it to remain that way. It would not be appropriate to say the legislature in that instance acted with an invidious racial purpose.

Last Sunday evening, the Louisiana Legislature passed and Governor Roemer signed new plans for each House and we are currently reviewing them with an eye toward the legislative election scheduled for this October.

In Mississippi, we objected to the plans for the State House and Senate because the evidence indicated that the legislature had deliberately fragmented black population concentrations in order to dilute minority voting strength. In reaching this conclusion, we relied in part on the fact that compact and contiguous minority districts could easily have been created but were not and the legislature had no plausible, nonracial explanation for its actions. We

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[3] *Garza v. County Of Los Angeles*, 918 F.2d 763, 779 (9th Cir. 1990) (Opinion of Kozinski J. concurring in part and dissenting in part).

also relied on evidence that support for the submitted plans and opposition to the principal alternative plans often were characterized by overt racial appeals.

In several instances, the state argued that its plan did in fact create viable minority districts where blacks comprised 60% or more of the voting age population. But raw numbers alone can be misleading. We looked, as we always do, behind the numbers to the underlying facts. We uncovered evidence that blacks in those districts would not be a majority of the likely voters. In one district, for example, a critical number of blacks were inmates in a state prison who, of course, cannot vote. In another, they were college students who would not be in the area at the time of the August primary. In others, critical numbers of blacks had low turnout rates because they lived in isolated rural areas, far from the polls and without cars or access to public transportation.

After our objection, the Mississippi Legislature failed to agree on a new plan and a three-judge court was convened to fashion a map. That court, which is still working on a districting plan, recently decided to hold elections in 1991 under the districting lines and to hold special elections under a new map in 1992.

In Virginia, the state plan created eleven minority House districts. Alternatives proposed by the NAACP, the Republican Party and the ACLU would have provided for thirteen minority districts. The state's main justification for refusing to create the two additional districts was that the state plan had been drafted by the legislative black caucus. We were not convinced, however, that the decision to reject the two additional minority districts originated entirely with the black caucus or that their endorsement of the state plan negated the possibility of a deliberate design to protect incumbents at the expense of minority representation.

The state also argued that it had refused to create a proposed minority district in the Richmond area because

the creation of that district would have endangered a minority incumbent in Richmond. But our analysis indicated that the minority incumbent would still have been in a viable minority district under the alternative plan—albeit not one as much to her liking. Under those circumstances, we concluded that protection of the incumbent minority legislator was not a valid reason for rejecting an alternative that would have given minority voters outside of her district an opportunity to elect candidates of their choice.

Along the southern border of Virginia the circumstances were different and, although it was a close question, we concluded that the state did have valid reasons for not creating yet another proposed minority Senate district in the Danville area. Among other things, the district lines under the alternative plan for that area would have fractured two independent cities.

I should add that our objection in Virginia was very narrowly focused. The state was able to remedy the problem quickly and without disrupting other parts of its plan. We gave the state's revised submission priority attention and, I am happy to say, we were able to preclear it within 24 hours of its submission.

In New York City, the situation was not simply black and white. Rather, due to large numbers of Asians and Hispanics, the situation was black, brown, yellow and white, which immeasurably complicated our task and the task of the New York City Districting Commission. We found that blacks and Asians had been treated fairly but that Hispanic voting strength had been diluted, apparently as the result of an effort to augment black voting strength.

The proposed map for the New York City Council created only six viable Hispanic districts out of a total of 51, even though Hispanics constituted approximately one quarter of the city's population—but only 15% of the

registered voters. There were two other districts in which Hispanics constituted a majority of the voting age population but only a slim plurality of the registered voters. Our analysis indicated that there was a significant risk that Hispanics would not be able to elect candidates of their choice in those districts because of a number of factors, including their lower turnout rate.

These concerns had been brought to the attention of the Districting Commission by members of the Hispanic community but the Districting Commission had rejected proposals to add Hispanic voters to those districts. Our task was to decide whether the Commission had been motivated, in whole or in part, by a discriminatory purpose or whether the Commission had acted for a valid, non-racial reason. The Commission argued that it had a valid reason, namely to avoid weakening Hispanic majorities in adjacent areas. Our analysis, however, revealed that changes could be made that would not endanger the adjacent Hispanic districts. There was also evidence that Hispanics had not been treated as fairly as other groups in the districting process and that the Commission appeared to be making choices throughout its plan, including areas of the city not covered by section 5, that consistently disfavored Hispanics. Based on the totality of of the circumstances, we concluded that the Commission did not have valid reasons for rejecting the proposals to strengthen the marginal Hispanic districts and giving the Hispanic voters in those districts a real opportunity to elect candidates of their choice. Accordingly, we interposed an objection.

Again, I would like to note that our objections in New York were very narrowly focused and easily remedied. Within a week the Commission was able to agree upon changes that met our objections without significantly disrupting the remainder of the plan. As was the case with Virgina, we gave the revised submission priority atten-

tion and we were able to preclear on the same day it was submitted.

Let me hasten to add that these examples are given not to highlight the racial discrimination in Louisiana, or in Virginia, or in Mississippi, or in New York City. Rather, I offer these examples merely to help guide you as your wrestle with various aspects of the very difficult process of redistricting in your own state.

In closing, let me say that we understand the problems that you face in attempting to devise and enact new districting plans. Census data may be late and not as complete or accurate as we all would like. Tight time frames will govern the redistricting process. Various interest groups and commentators will be pulling you in different directions at once. But I believe that together we can ensure that the coming round of redistricting efforts will produce plans that provide the full measure of fairness to racial and language minorities required by the Voting Rights Act and the Constitution.

As President Johnson said when the Act was passed twenty-six years ago, discrimination in voting is a wrong which no American, in his heart, can justify. The right to vote is one which no American, true to our principles, can deny.

Let us all work hard—and together—to achieve that cherished goal. I think we can do it.

DEPOSITION OF DAVID HORN
(December 10, 1991)
[Docket #113]

[11] Q. This is a Xerox copy of a document which was produced in discovery in this case, Mr. Horn. Can you identify it as a document that you wrote?

A. Definitely. I wrote that document, I would say probably early September.

Q. Of 1991?

A. Correct.

Q. How did you come to write this document?

[12] A. I would say the primary motive was curiosity. I had earlier done a similar exercise for a seminar that the Center held in November 16, 1990, here in Columbus, which I hope you have a copy of the seminar document. It is over, what, 52 pages in length.

Q. I think I do.

A. And it contained, a central part of that document contains, a central part of this seminar document contains an exercise called "Hypothetical Republican Gerrymander." Actually the descriptive page is entitled "Let's Pretend." And in that exercise I, using 1980 data, I pretended that I was a consultant hired by the Republican Party of Ohio under a situation in which they rather than the Democrats had controlled the Apportionment Board, and tried to find out just how much I could hurt Democrats by drawing a plan that would still meet the enforceable requirements of Article XI of the Ohio Constitution.

And so you can examine that document at your leisure. But it then gives you the background to the document you are now asking about, "Republican Opportunities." It is simply a partial plan based on 1990 data because, having determined just how possible it is to hurt the out party under the 1980 situation, one naturally asks, well, what would Republicans do this [13] year now that they are in control of the board.

Now I should emphasize that this is only a, quote, partial plan. the reason being that first my time is limited and the data that you need to draw plans in the major urban counties was simply not in any realistic manner available to the general public, of which I guess I am part.

So that plan covers just the rural parts of the state. And it was done in probably two days' time. And the principal data source I was able to get, and this is a document produced by the Ohio Data Users Center, which gives you the populations of all the counties, townships, municipal corporations. But it doesn't give you the populations of the innercities, which is what you need to know the census tracts and more detailed information.

So that's why what you see there, what does it say, for instance Hamilton County, "Pack as many Democrats as possible into the black majority innercity HDs." I don't actually do that, I am just, you know, sort of saying this would be the plan, just as was actually done with real data in the earlier exercise called "Hypothetical Republican Gerrymandering."

* * * *

[37] Q. And this section called "Let's Pretend" was based on actual population data; is that correct?

A. This is real plans using real demographical data, yes.

Q. And it formed the basis for at least some of your thinking on the document entitled "Republican Opportunities."

A. I earlier said just exactly that to you, yes.

Q. Now I note that the strategy is the same with [38] respect to Franklin County and Hamilton County, in "Let's Pretend" and in "Republican Opportunities." Is that correct, sir?

A. Correct.

Q. You observe that in "Republican Opportunities" the same sentence appears, "Pack as many Demos as

possible into two black innercity HDs, both for Hamilton and Franklin, also for Montgomery County," correct?

A. Correct.

* * * *

[48] Q. You will note that in your plan you state "Pack as many Demos as possible into two black majority innercity HDs," correct?

A. Correct.

* * * *

[51] Q. (By Mr. Gilliam) Let me ask you a question again about "Let's Pretend," the same document that I believe you have got here.

With respect to Hamilton County, again the "Let's Pretend" document identified Republican strategy, "To pack the Democratic majority, as much of the Democratic majority minority"—

A. Minority.

Q. —"into two heavily Democratic districts, HD 23 and 25, with black majorities," correct?

A. Correct. Common sense, any Republican consultant would want to do that.

MR. COLLIER: Object, move to strike.

Q. The next statement is, "Then fragment the remaining Democrats into six Republican dominated districts," correct?

[52] A. Correct.

Q. And when you look at Republican gerrymander for Hamilton County for 23 we see a number of 53.4 for black population, correct?

A. Correct.

MR. COLLIER: Object, leading.

Q. And for 25 the number is 50.1; is that right, sir?

MR. COLLIER: Object, leading.

A. That is my calculation based on the documents we prepared for the seminar a year ago.

* * * *

Q. And did you consider that those two figures were representative of packing in Hamilton County?

MR. COLLIER: Objection.

A. Definitely yes.

Q. And you say that with great conviction. Why is that, sir?

A. Because I labored mightily to see how much I could do, I spent several hours, if you look at the [53] seminar document and you look at the configurations of the districts you know somebody could not do that in 15 minutes. It takes effort, and I made the best effort I could.

* * * *

[54] Q. Now with respect to Montgomery County, in the "Republican Opportunities" document you state, "Pack as many Demos as possible into two black minority innercity HDs having incumbents Roberts and McLin." Is that right, sir?

A. That's correct.

Q. You then suggest, "Break up Hickey's district, pairing with him with wither Guerra or Corbin in heavily Republican HD. Create new open HD in southern and eastern townships"—

A. I think it is western.

Q. —"western townships," thank you. Equal opportunity equals 1."

Now with respect to Montgomery County, the number that you put into "Let's Pretend" for Republican gerrymandering was HD 36, 33.1 and HD 37, 46.5; is that correct, sir?

A. That's right.

Q. Is that as heavy a packing of Democrats into districts as you could do?

A. It was the best I could do using the 1980 data.

* * * *

[98] Q. Minority majority district, a district over 50 percent?

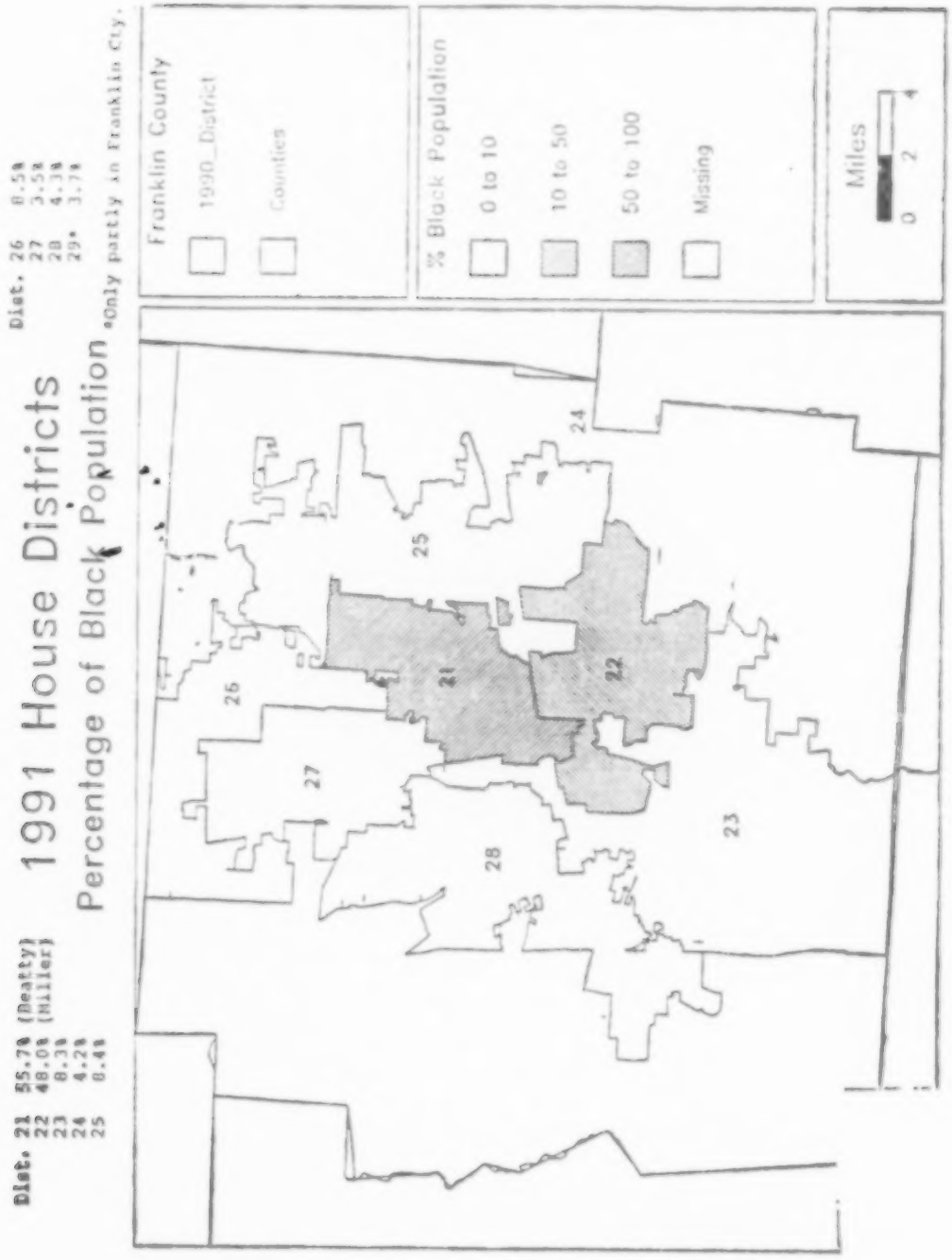
A. I would say 40 percent or 45 percent. And, of course, you don't have to have a majority of African-

Americans in Ohio to elect an African-American to the legislature. I think my researches show that any—there is only one district in the last 20 years that had less than, had more than—how do I put it—more than 35 percent African-American population that [99] did not elect an African-American. And that was Senate District 25 in Cleveland, which elected Lee Fisher.

But aside from that, 35 percent African-American is probably—well, Ray Miller himself made that statement years ago at one of our informal seminars. 35 percent is considered adequate to elect a black person in Ohio because you don't have the history of racial polarization in our voting.

* * * *

**[Exhibit 5 to
Deposition of David Horn (December 10, 1991)]**



FRANKLIN COUNTY SUMMARY

1. The Majority Plan increases black population beyond the previous highest levels in two districts. District 21 is now 55.7%; District 2 is now 48.0%. The previous highest levels were 46.8% in District 31 and 38.5% in District 29.

2. The Majority Plan increases the Democratic index concentration beyond the previous highest levels. District 21 is now 76.50; District 22 is now 69.35. The highest previous levels were 66.33 in District 31 and 62.97 in District 29.

3. There are now *seven* districts with less than 10% black population. Under the previous boundaries there were *four* such districts.

4. Minority Representative Ray Miller has been elected for six consecutive terms. His black population was increased from 38.5% to 48.0%; his Democratic concentration was increased from 62.97 to 69.35.

5. Minority Representative Otto Beatty has been elected for seven consecutive terms. His black population has been increased from 46.8% to 55.7%; his Democratic index has been increased from 66.33 to 76.50.

6. The net changes in political strength are as follows:

1981	1991
3 Strong D's (29, 31, 32)	2 Strong D's (21, 22)
1 Moderate D (30)	1 Marginal D (23)
4 Moderate R's (28, 33, 34, 35)	2 Moderate R's (25, 27)
	4 Strong R's (24, 26, 28, 29)
4 D's; 4 R's	3 D's; 6 R's

FRANKLIN COUNTY

1981 DISTRICTS				1991 DISTRICTS [1]			
Minority Rep.	District No.	% Black Pop.	VI	Minority Rep.	District No.	Pop. % Black	VI
	28	5.9	45.41(MR)	O. Beatty	21	55.7	76.50(SD)
R. Miller (elected for 6 terms)	29	38.5	62.97(SD)	R. Miller	22	48.0	69.35(SD)
	30	12.4	55.14(MD)		23	8.3	51.92(XD)
O. Beatty (elected for 7 terms)	31	46.8	66.33(SD)		24	4.2	39.77(SR)
	32	26.6	58.02(SD)		25	8.4	43.50(MR)
	33	4.1	44.49(MR)		26	8.5	40.56(SR)
	34	5.1	39.00(SR)		27	3.5	43.90(MR)
	35	1.4	34.27(SR)		28	4.3	39.95(SR)
					29*	3.7	38.04(SR)
			4 D's 4 R's				3 D's 6 R's

[1] Closest Correspondence of Districts 29 and 31
29-21
31-22

* Only partly in Franklin County

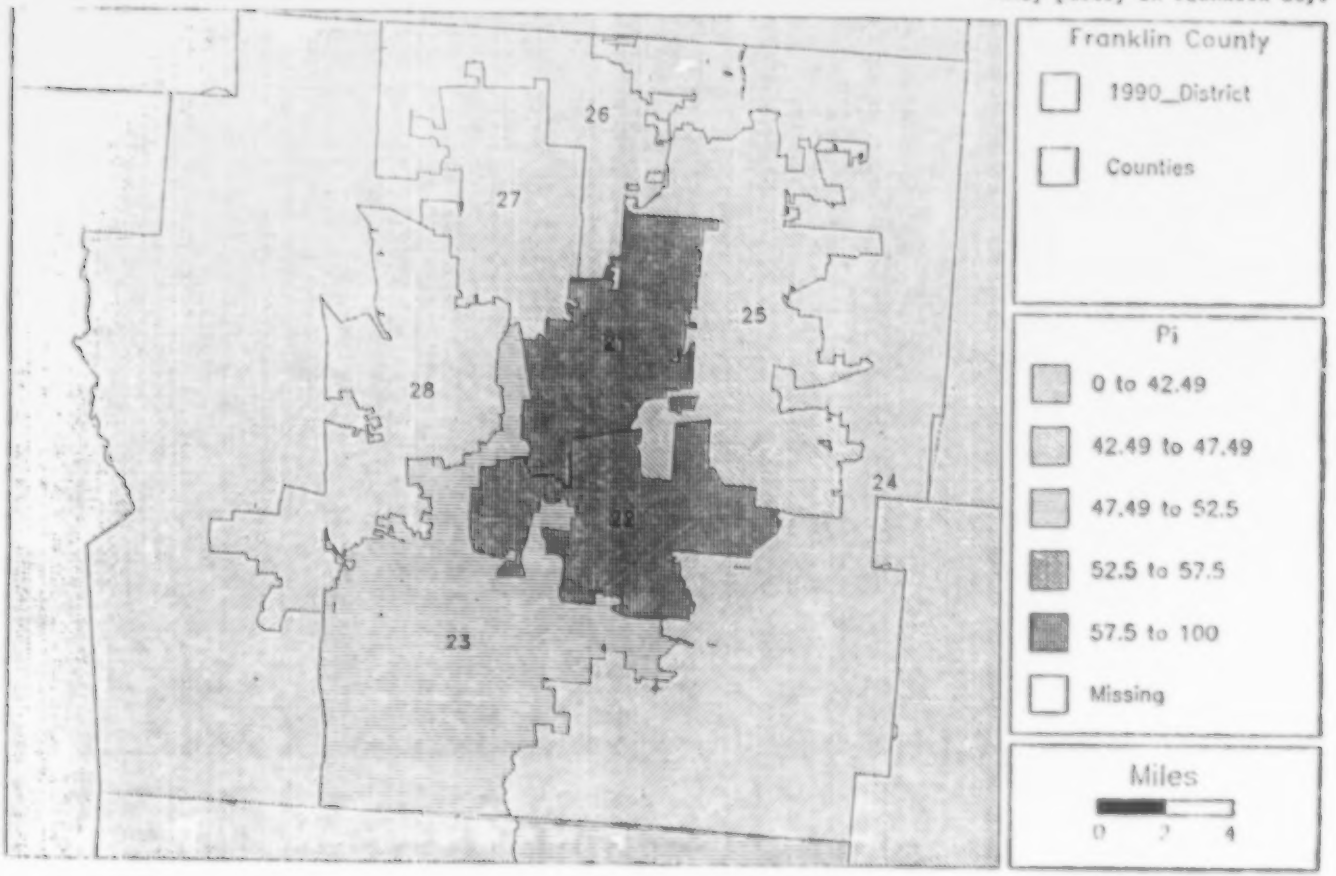
BEST AVAILABLE COPY

Dist. 21 76.50 (SD)
22 69.35 (SD)
23 51.92 (HD)
24 39.77 (SR)
25 41.50 (HR)

1991 House Districts
Voting Index

Dist. 26 40.56 (SR)
27 43.90 (HR)
28 39.95 (SR)
29* 38.04 (SR)

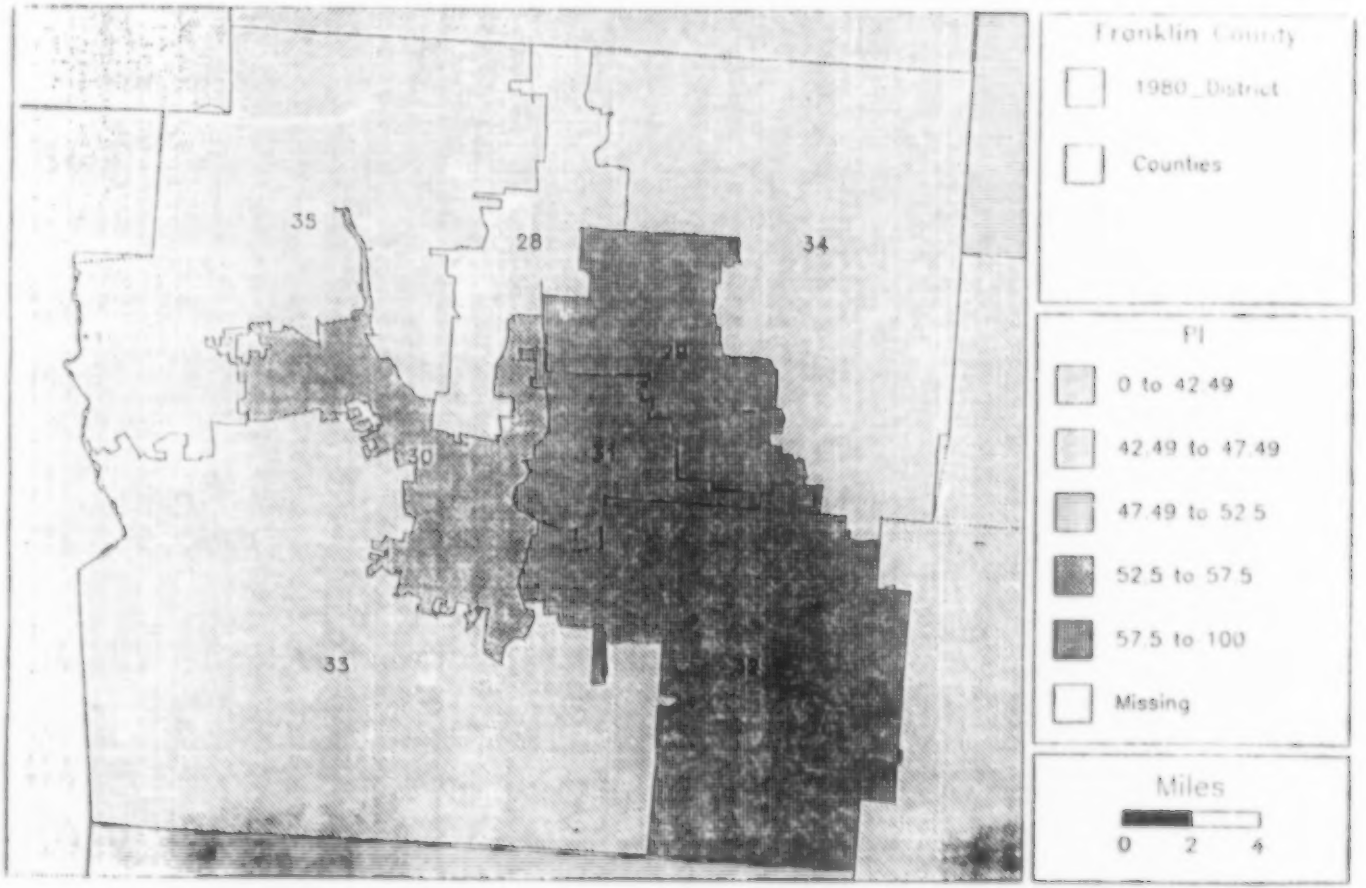
*Only partly in Franklin Cty.



1981 House Districts
Voting Index

Dist. 28 45.41 (MR)
29 62.97 (SD)
30 55.14 (MD)
31 66.33 (SD)

Dist. 32 58.02 (SD)
33 44.49 (MR)
34 39.00 (SR)
35 14.27 (SR)



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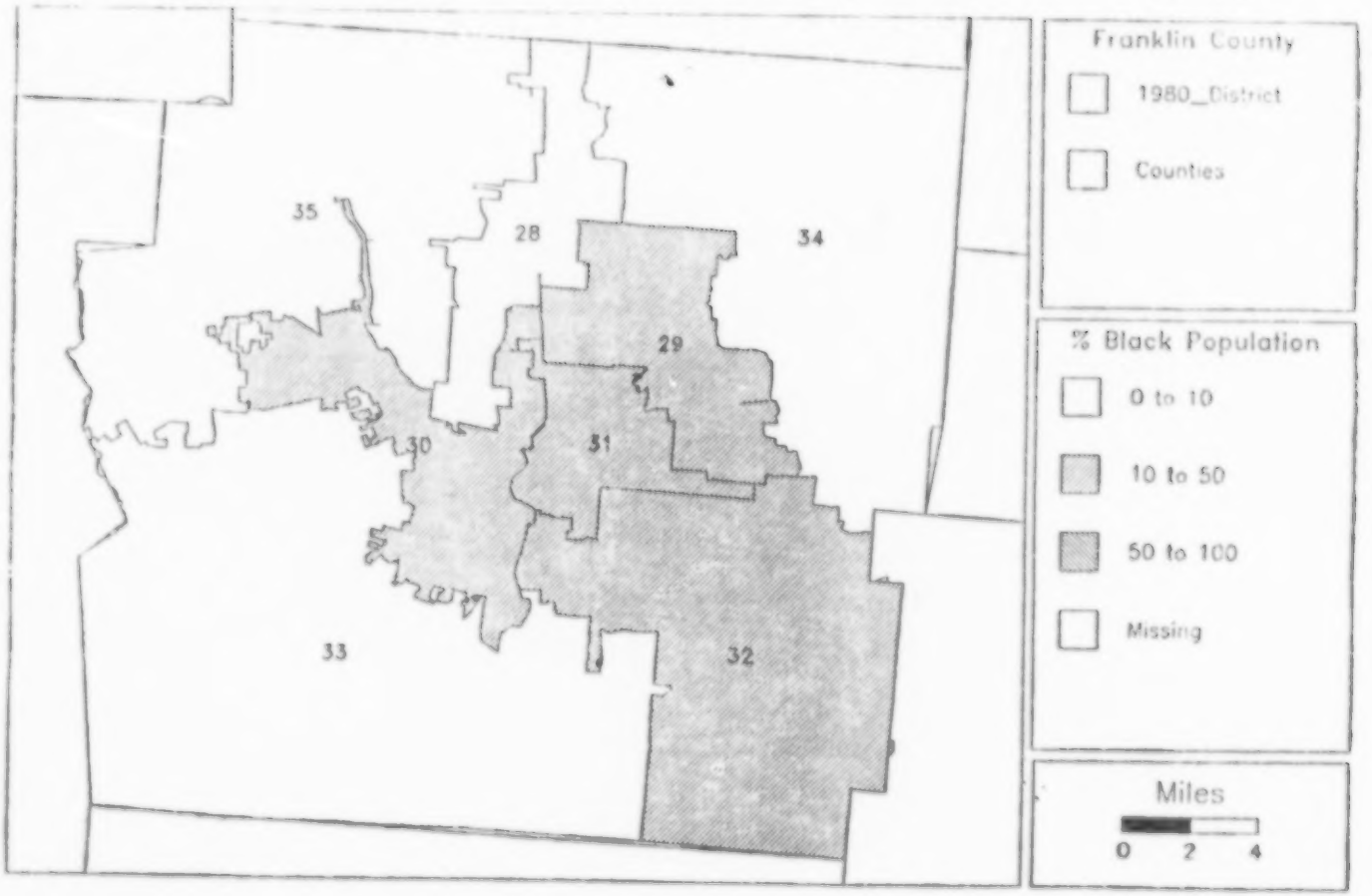
1981 House Districts
Percentage of Black Population

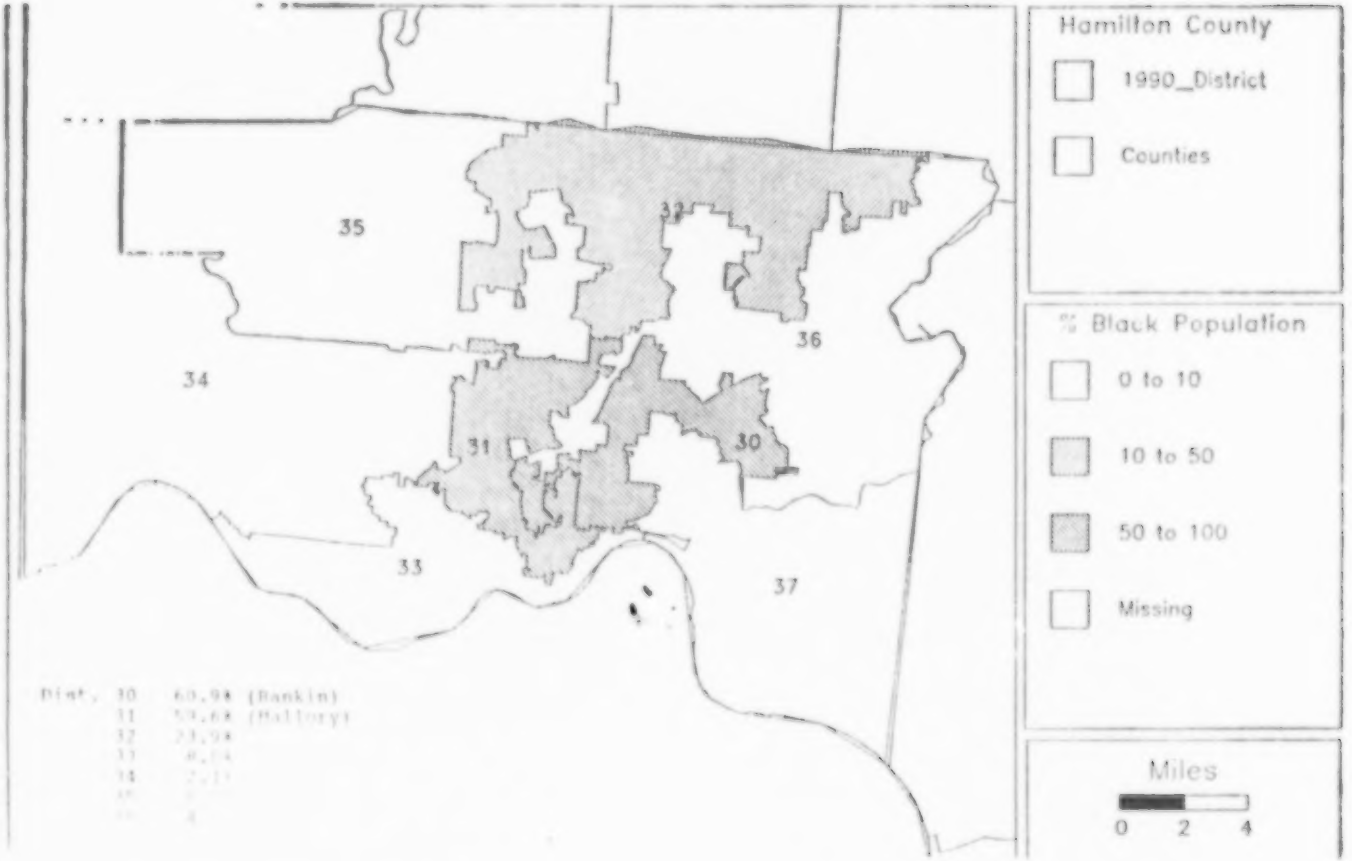
Dist. 28 5.9%
29 38.5% (Miller)
30 12.8%
31 46.8% (Beatty)

Dist. 32 26.6%
33 4.1%
34 5.1%
35 1.4%

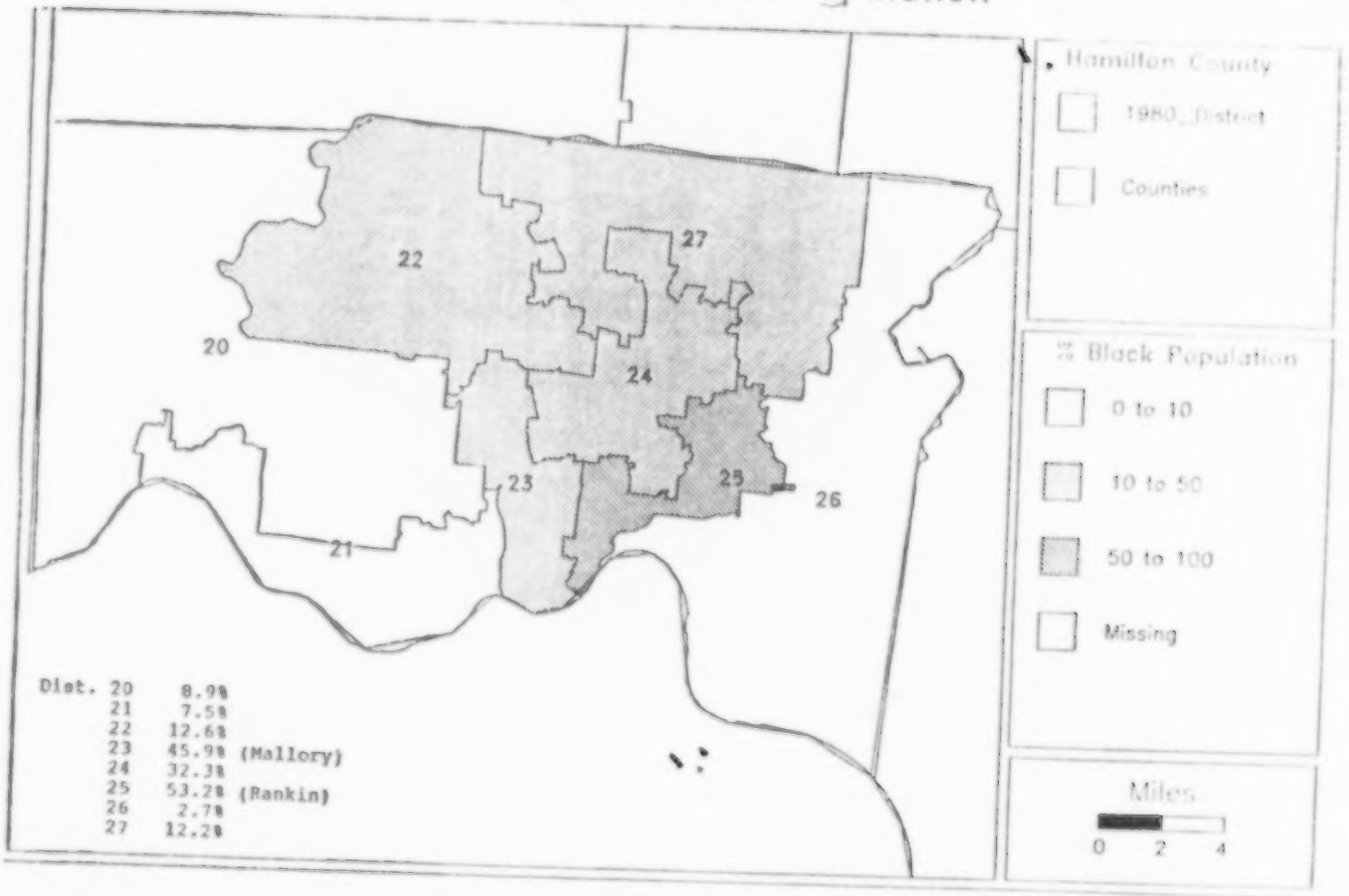


1991 House Districts

Percentage of Black Population

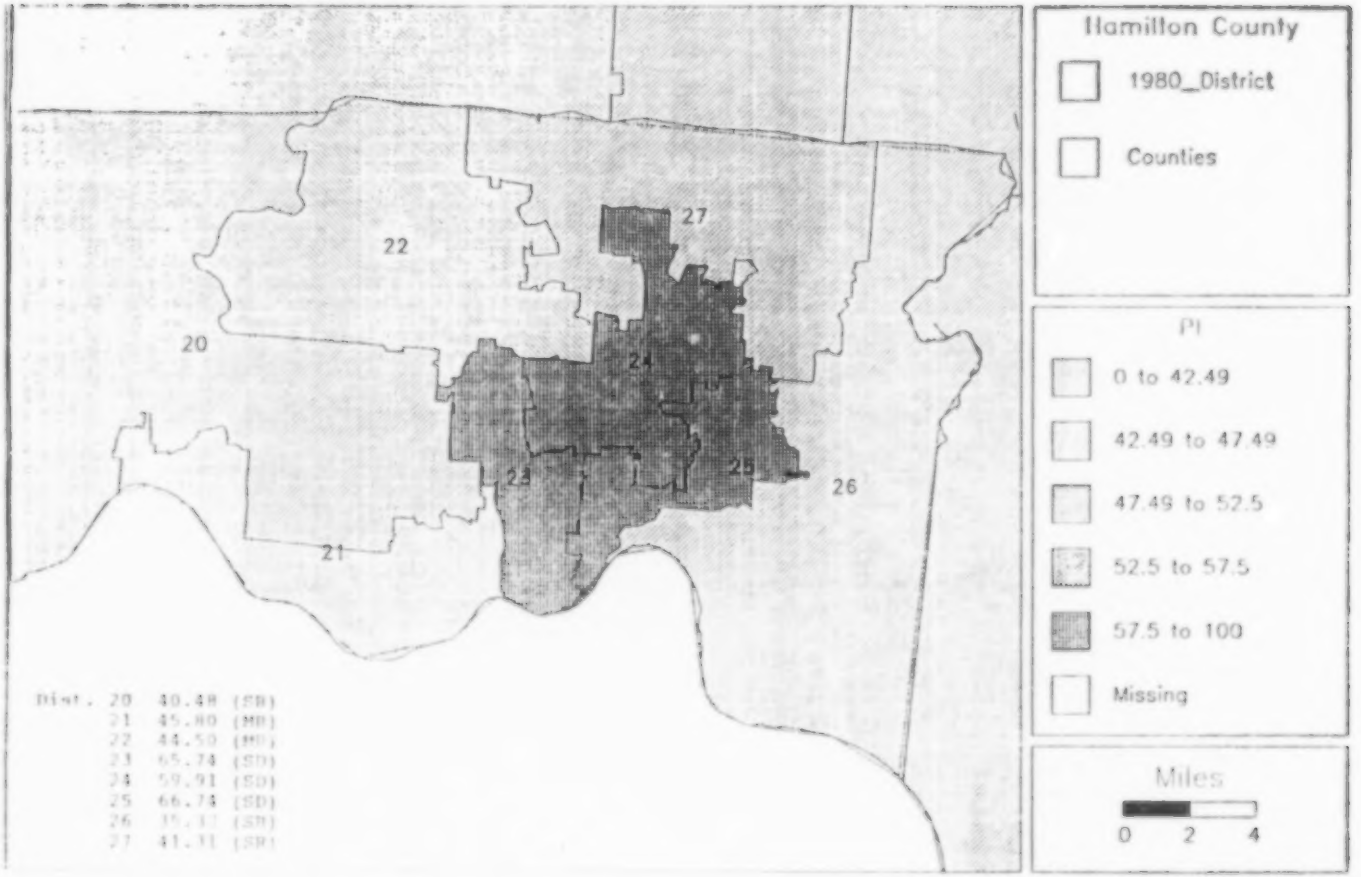


1981 House Districts
Percentage of Black Population



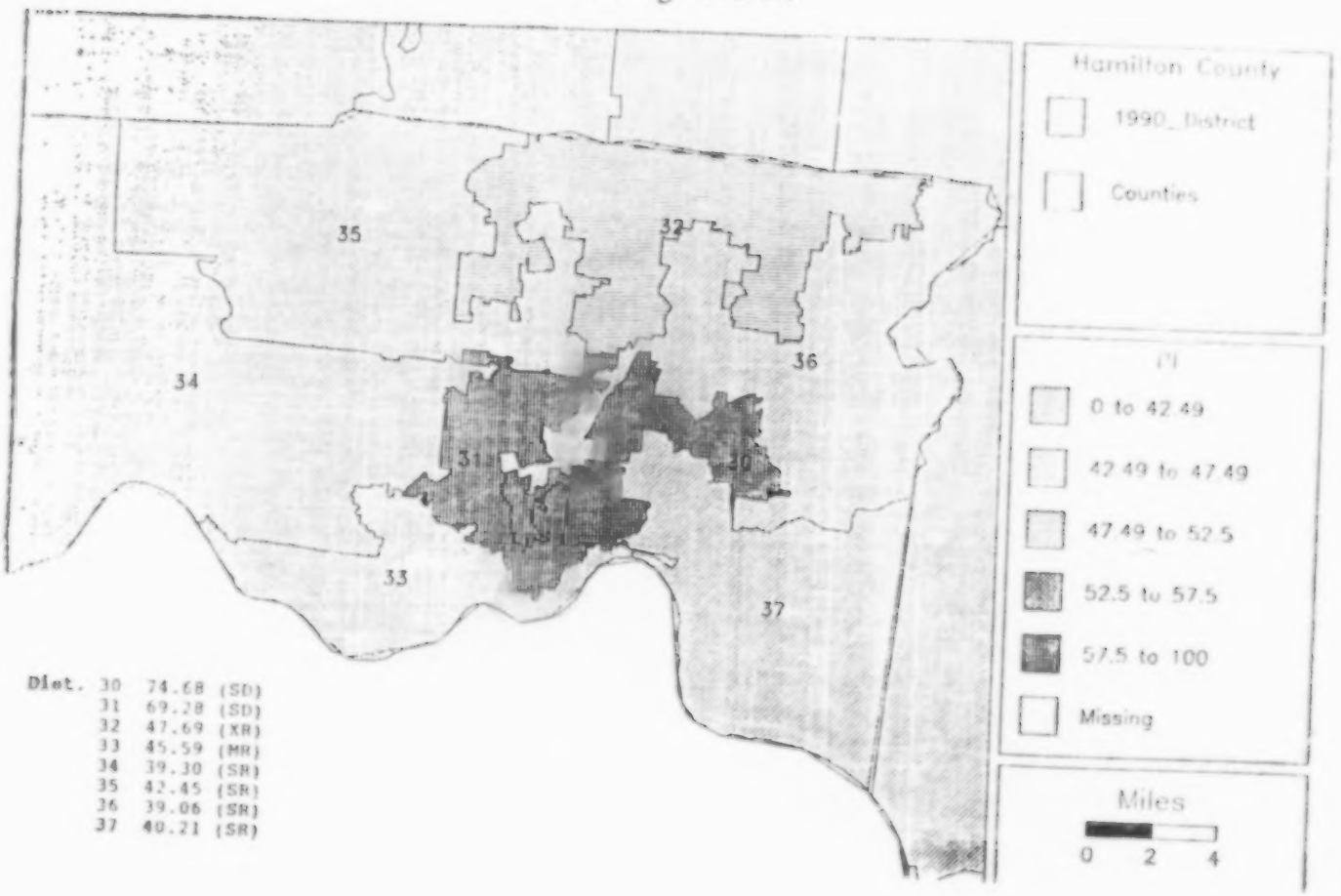
1981 House Districts

Voting Index



1991 House Districts

Voting Index



Dist.		
30	74.68	(SD)
31	69.28	(SD)
32	47.69	(XR)
33	45.59	(MR)
34	39.30	(SR)
35	42.45	(SR)
36	39.06	(SR)
37	40.21	(SR)

HAMILTON COUNTY

1981 DISTRICTS				1991 DISTRICTS [1]			
Minority Rep.	District No.	% Black Pop.	VI	Minority Rep.	District No.	% Black Pop.	VI
	20	8.9	40.48(SR)	L. H. Rankin	30	60.9	74.68(SD)
	21	7.5	45.80(MR)	W. Mallory	31	59.6	69.28(SD)
	22	12.6	44.50(MR)		32	23.9	47.69(XR)
W. Mallory (elected for 13 terms)	23	45.9	65.74(SD)		33	8.0	45.59(MR)
	24	32.3	59.91(SD)		34	2.1	39.30(SR)
L. H. Rankin (elected for 8 terms)	25	53.2	66.74(SD)		35	8.9	42.45(SR)
	26	2.7	35.33(SR)		36	4.5	39.06(SR)
	27	12.2	41.31(SR)		37	2.1	40.21(SR)
			3 D's 5 R's				2 D's 6 R's

[1] Closest Correspondence of Districts 23 and 25
23-31
25-30

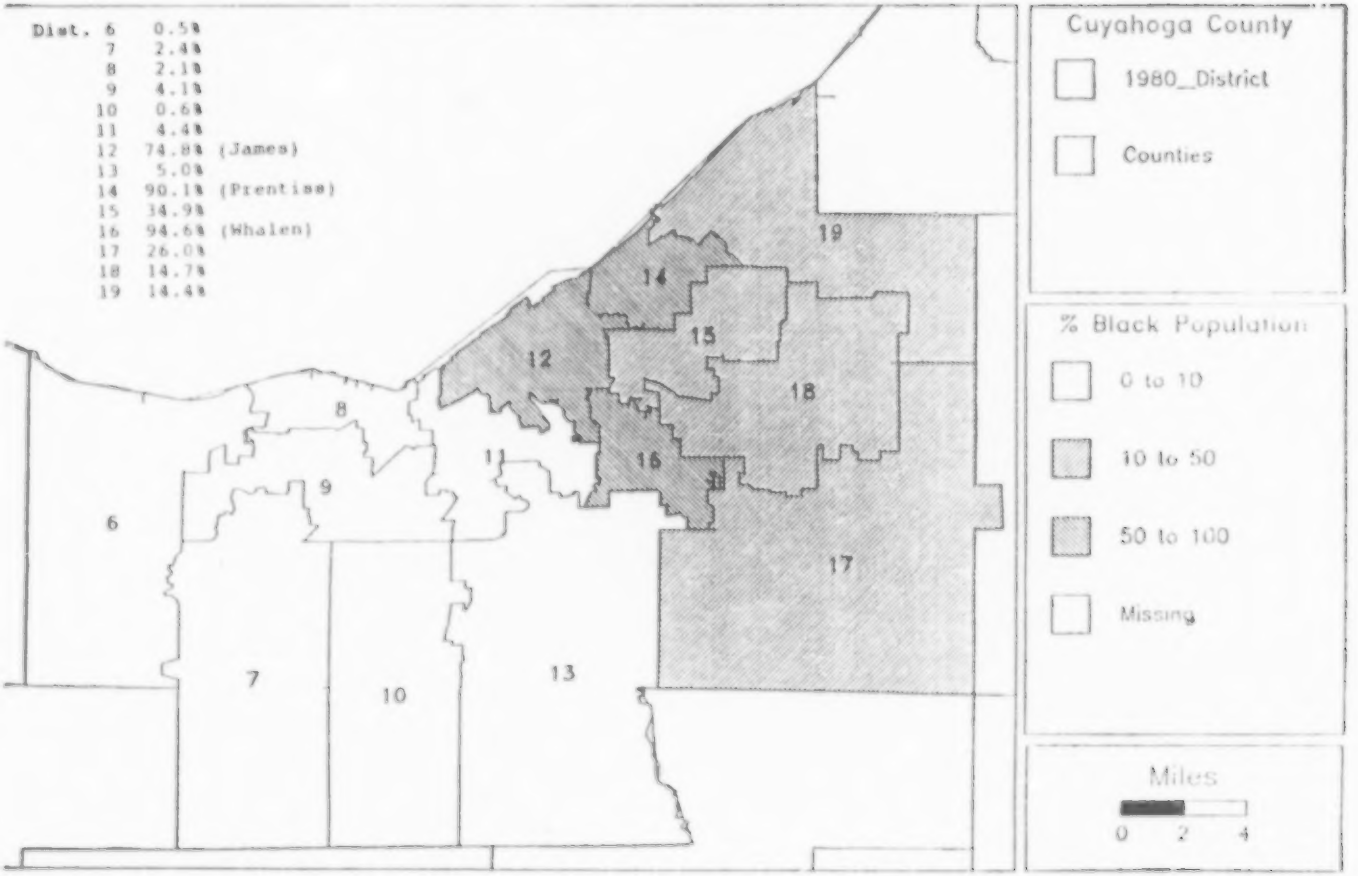
HAMILTON COUNTY SUMMARY

1. The Majority Plan increases black population beyond the previous highest levels in two Districts. District 30 is now 60.9%; District 31 is now 59.6%. The highest previous levels were 53.2% in District 25 and 45.9% in District 23.
2. The Majority Plan increases the Democratic index concentration beyond the previous highest levels. District 30 is 74.68; District 31 is now 69.28. The highest previous levels were 66.74 in District 25 and 65.74 in District 23.
3. There are now *five* districts with less than 10% black population. Under the previous boundaries there were *three* such districts.
4. There is now *one* minority impact district, District 32 with 23.9% black population percentage under the previous boundaries there were *three*, District 22 (12.6%); District 24 (32.3%); and District 27 (12.2%).
5. Minority Representative William Mallory has been elected for thirteen consecutive terms. His black population was increased from 45.9% to 59.6%; his Democratic concentration was increased from 65.74% to 69.28%.
6. Minority Representative L. Helen Rankin has been elected for eight consecutive terms. Her black population has been increased from 53.2% to 60.9%; her Democratic index has been increased from 66.74% to 74.68.
7. The net changes in political strength are as follows:

1981	1991
3 Strong D's (23, 24, 25)	2 Strong D's (30, 31)
	1 Marginal R (32)
2 Moderate R's (21, 22)	1 Moderate R (33)
3 Strong R's (20, 26, 27)	4 Strong R's (34, 35, 36, 37)
3 D's; 5 R's	2 D's; 6 R's

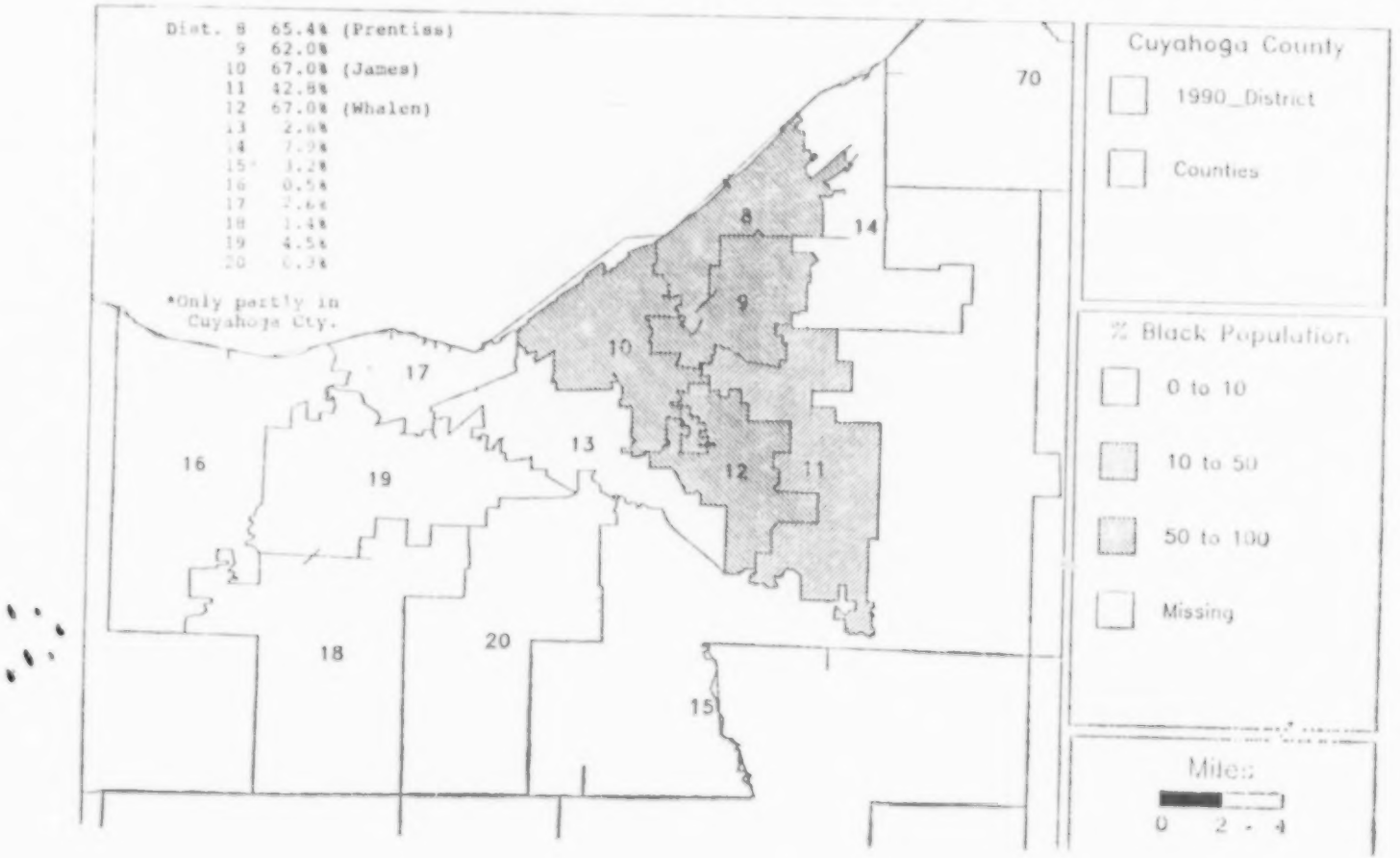
1981 House Districts

Percentage of Black Population



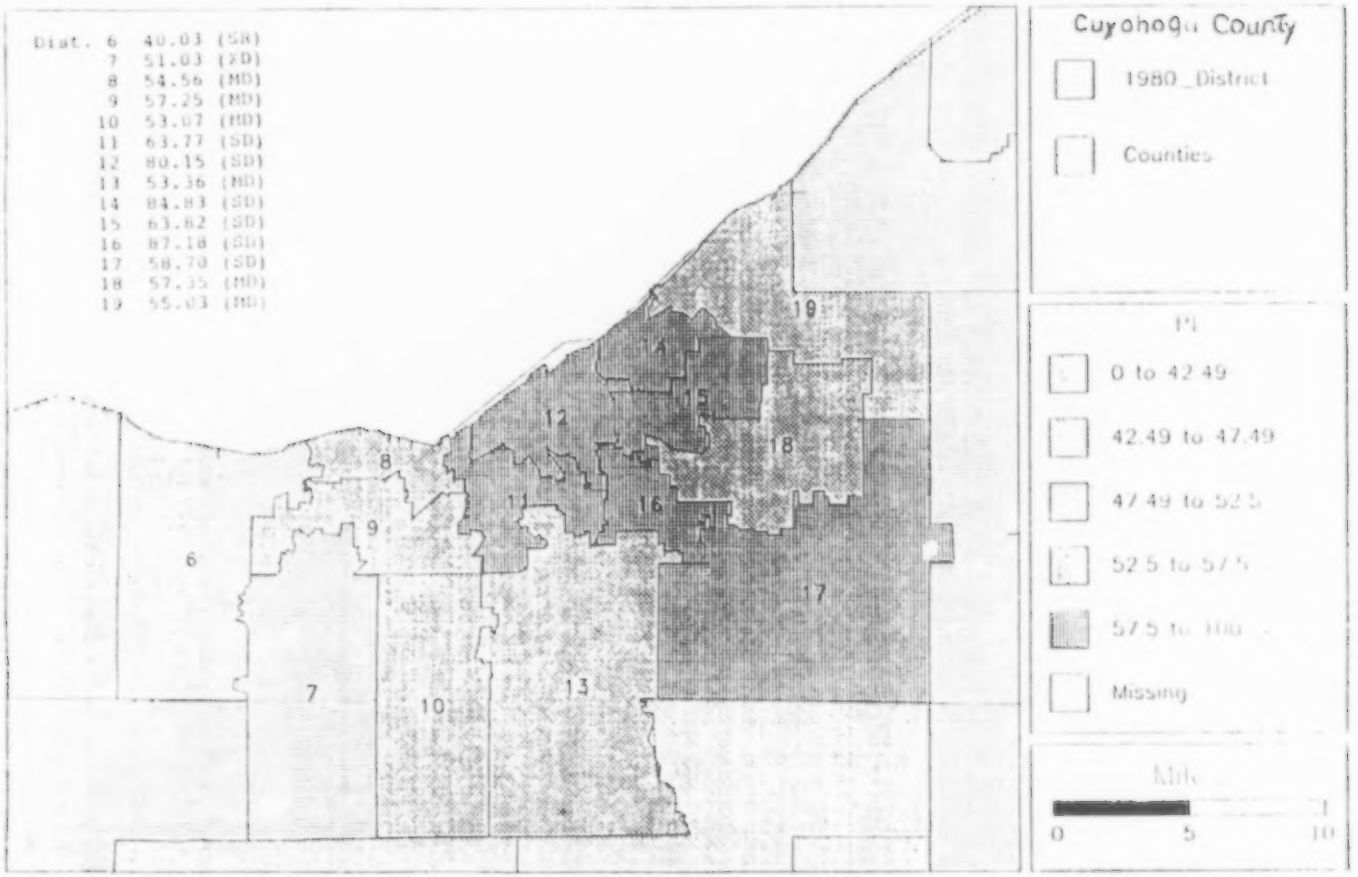
1991 House Districts

Percentage of Black Population



1981 House Districts

Voting Index



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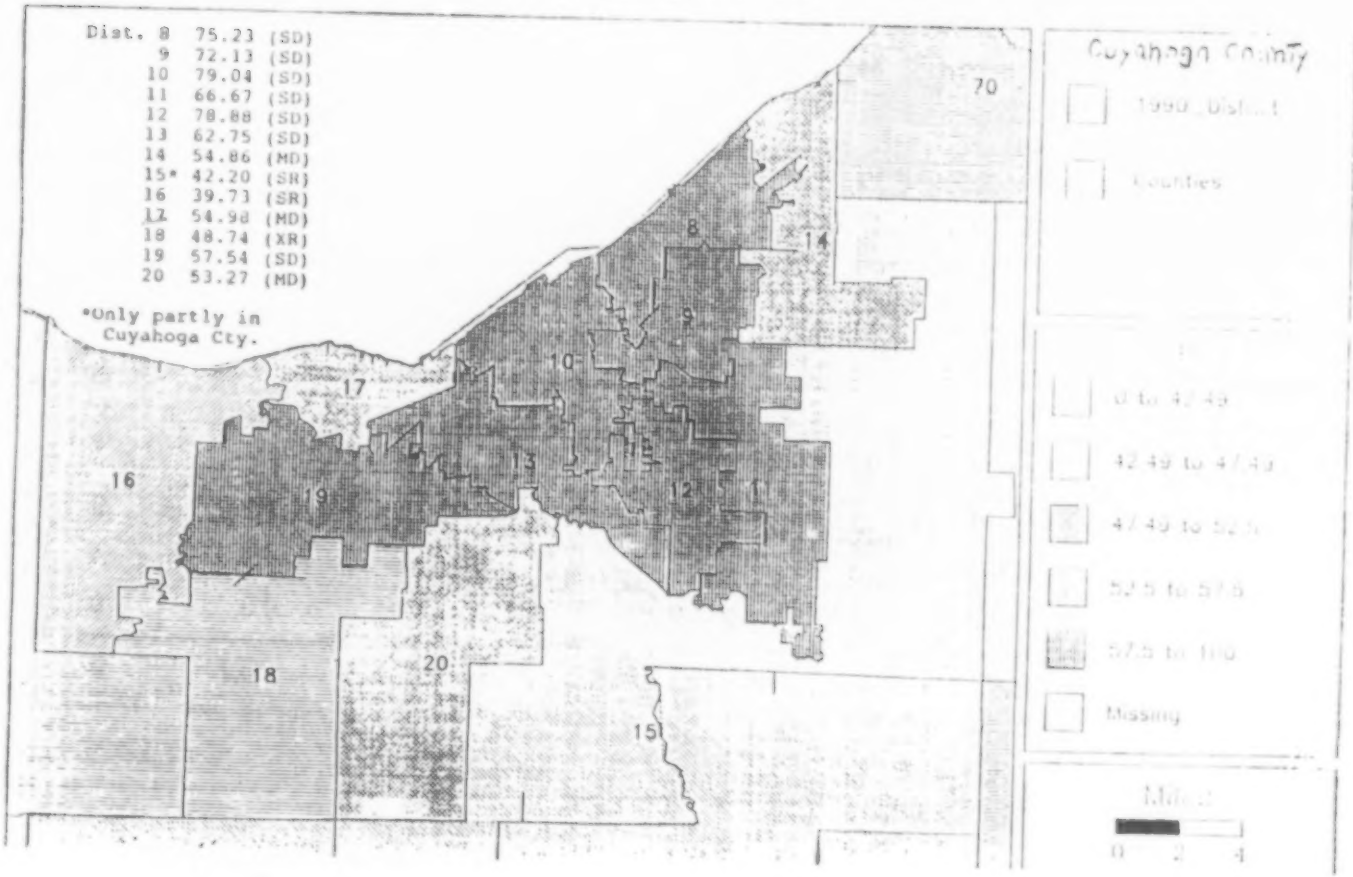
1991 House Districts
Voting Index



CUYAHOGA COUNTY

1981 DISTRICTS				1991 DISTRICTS [1]			
Rep. Minority	District No.	% Black Pop.	VI	Minority Rep.	District No.	% Black Pop.	VI
	6	0.5	40.03(SR)	C J. Prentiss	8	65.4	75.23(SD)
	7	2.4	51.03(XD)		9	62.0	72.13(SD)
	8	2.1	54.56(MD)	T. L. James	10	67.0	79.04(SD)
	9	4.1	57.25(MD)		11	42.8	66.67(SD)
	10	0.6	53.07(MD)	V. Whalen	12	67.0	78.88(SD)
	11	4.4	63.77(SD)		13	2.6	62.75(SD)
T. L. James (elected for 13 times)	12	74.8	80.15(SD)		14	7.9	54.86(MD)
	13	5.0	53.36(MD)		15*	3.2	42.20(SR)
C. J. Prentiss (elected for 1 term)	14	90.1	84.83(SD)		16	0.5	39.73(SR)
	15	34.9	63.82(SD)		17	2.6	54.98(MD)
V. Whalon (elected for 4 terms)	16	94.6	87.18(SD)		18	1.4	48.74(XR)

17	26.9	58.70(SD)	19	4.5	57.54(SD)
18	14.7	57.35(MD)	20	0.3	53.27(MD)
19	14.4	55.03(MD)			
		13 D's			10 D's
		1 R			3 R's

[1] Closest Correspondence of Districts 12, 14, 15, 16

12-10
14-08
15-09
16-12

* Only partly in Cuyahoga County

CUYAHOGA COUNTY SUMMARY

1. The Majority Plan increases the number of districts with black population exceeding 50% from three Districts (12, 14, 16) in 1981 to four Districts (8, 9, 10, 12).

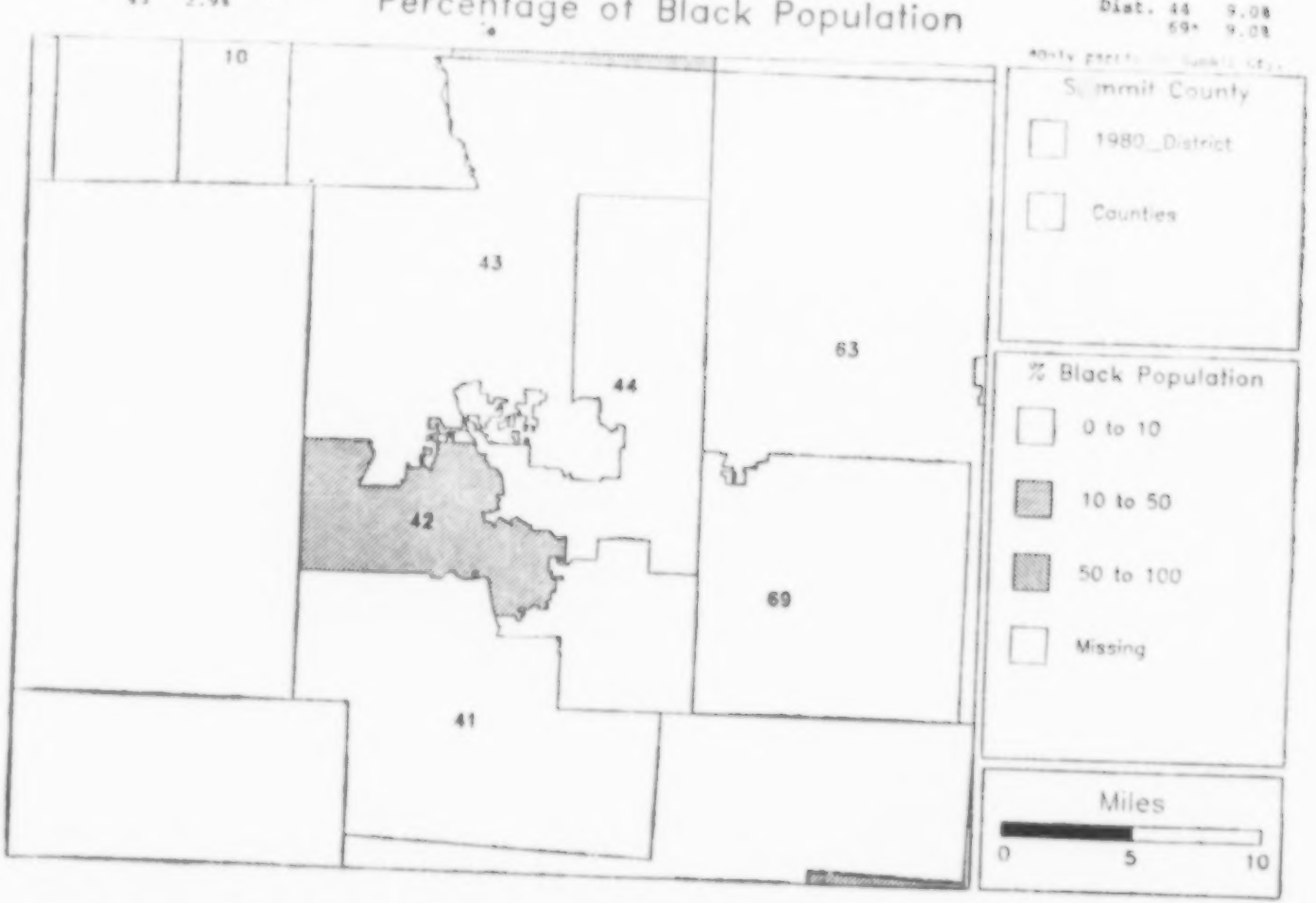
2. The Majority Plan decreases the number of minority impact districts from *four* to *one*. District 11 is the only impact district under the Majority Plan, with a 42.8% black population. The previous impact districts were 15 (34.9%); 17 (26.0%); 18 (14.7%); and 19 (14.4%).

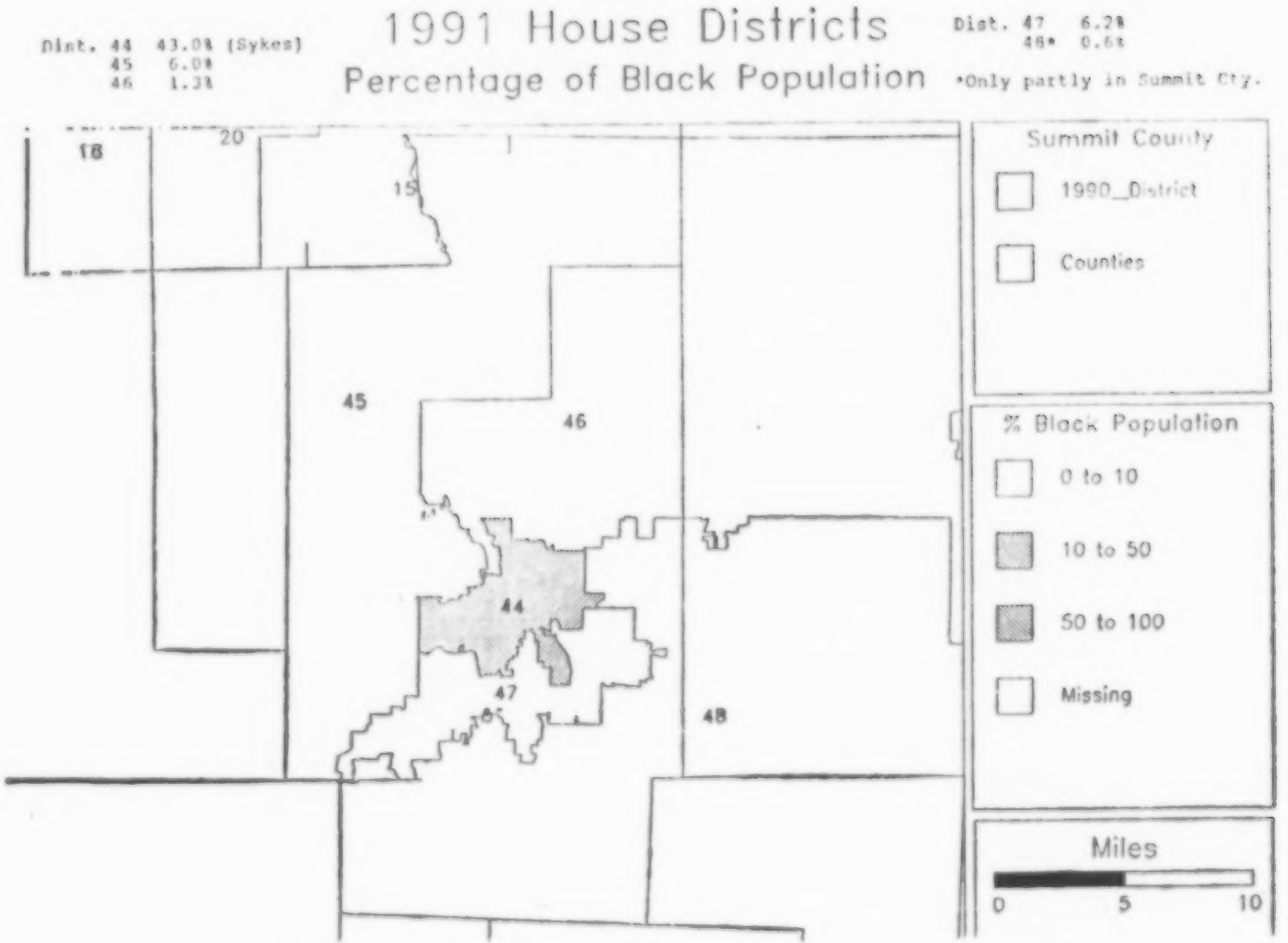
3. There are now eight districts with less than 10% black population. Under the previous boundaries there were seven such districts.

4. The net changes in political strength are as follows:

1981	1991
6 Strong D's (11, 12, 14, 15, 16, 17)	7 Strong D's (8, 9, 10, 11, 12, 13, 19)
6 Moderate D's (8, 9, 10, 13, 18, 19)	3 Moderate D's (14, 17, 20)
1 Marginal D (7)	1 Marginal R (18)
1 Strong R (6)	2 Strong R's (15, 16)
13 D's; 1 R	10 D's; 3 R's

1981 House Districts
Percentage of Black Population




Dist. 44 43.0% (Sykes)
45 6.0%
46 1.3%
1991 House Districts
Percentage of Black Population
Dist. 47 6.2%
48* 0.6%
*Only partly in Summit Cty.
18
20
15
1
45
46
44
47
48
Summit County
1990_District
Counties
% Black Population
0 to 10
10 to 50
50 to 100
Missing
Miles
0
5
10

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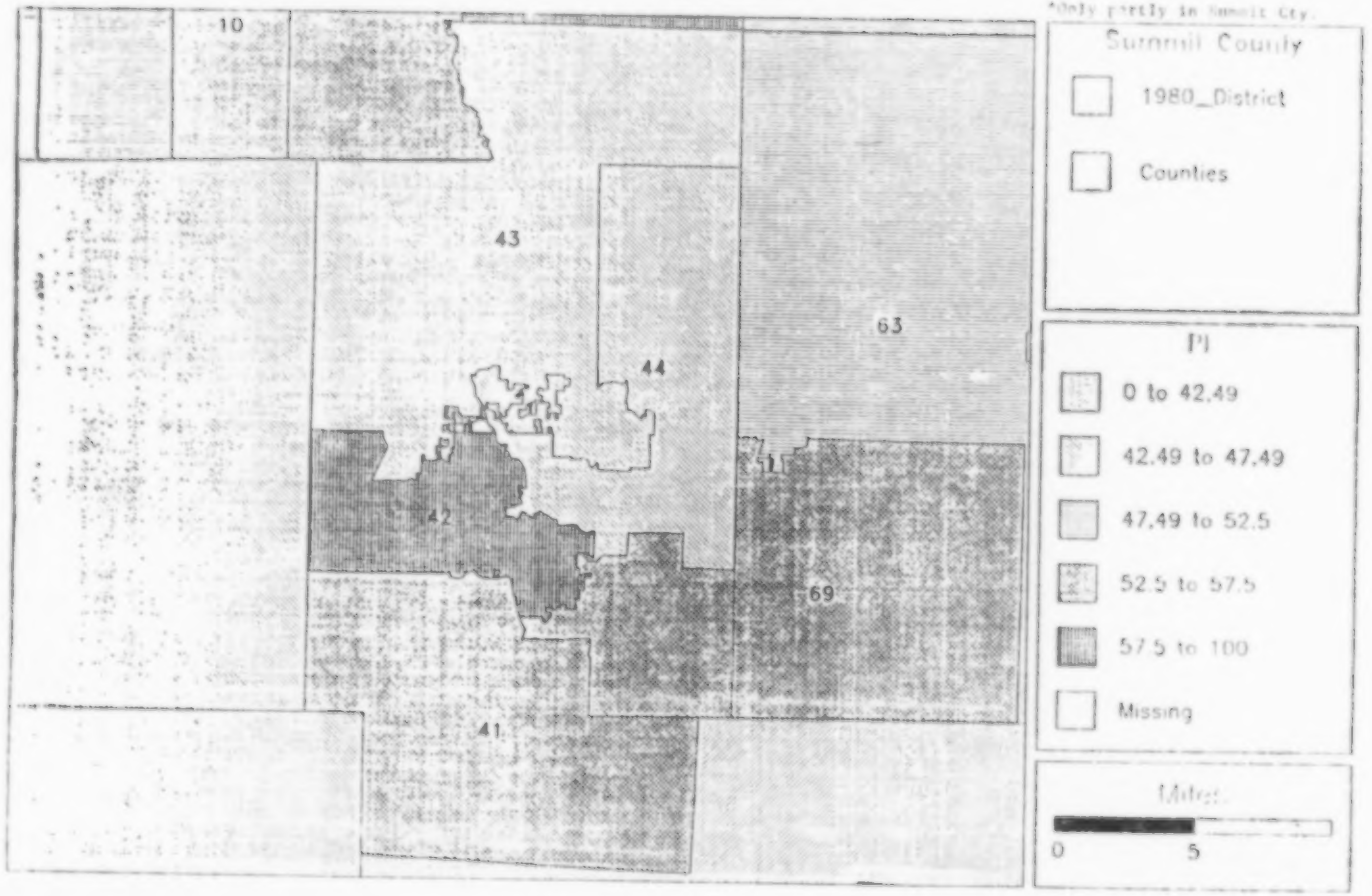
Dist. 41 54.18 (MD)
42 58.64 (SD)
43 46.57 (MR)

1981 House Districts

Voting Index

Dist. 44 46.43 (MR)
69* 57.32 (MD)

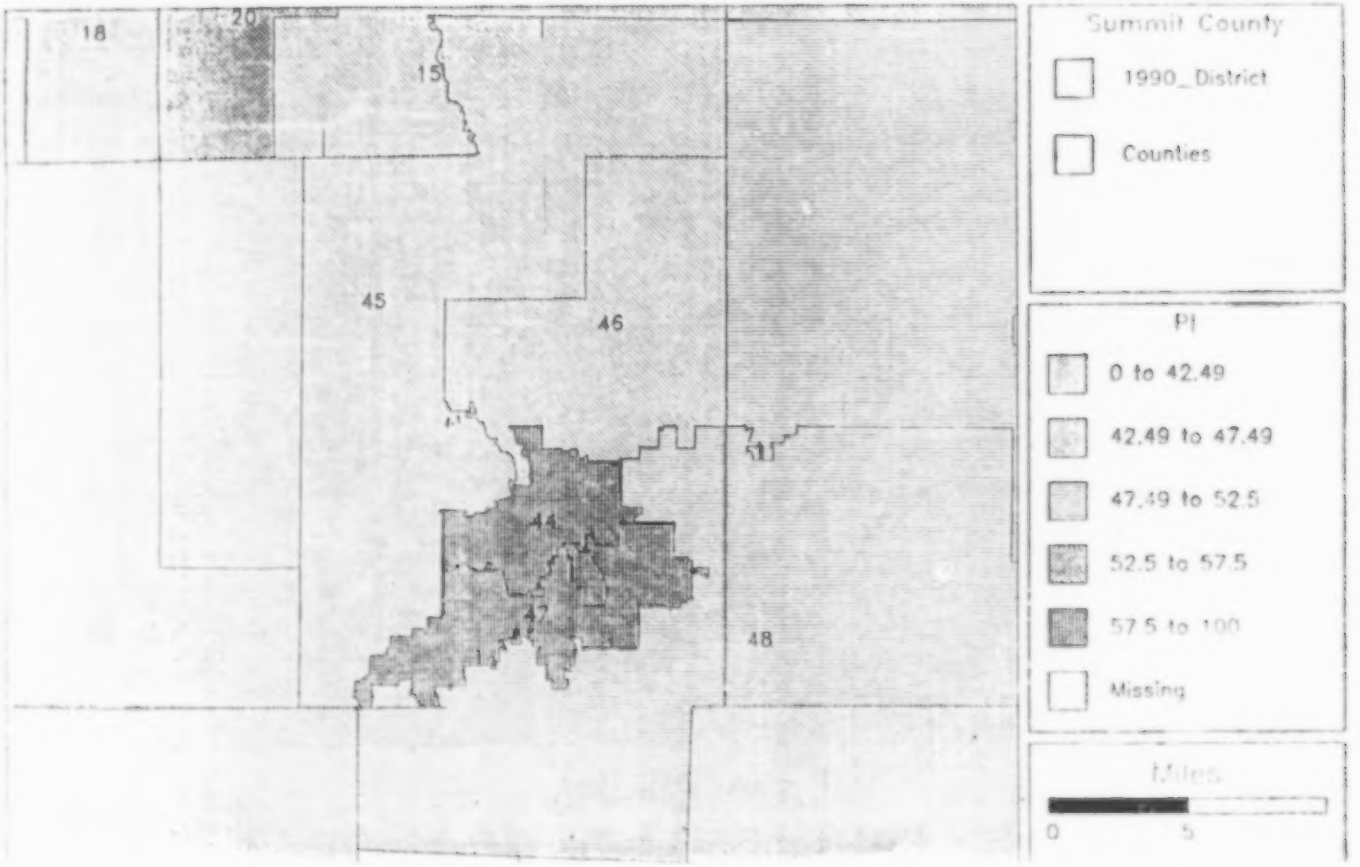


Dist. 44 72.21 (SD)
45 44.91 (HR)
46 43.06 (HR)

1991 House Districts
Voting Index

Dist. 47 59.99 (SD)
48* 51.35 (SD)

*Only partly in Summit Cty.



SUMMIT COUNTY

1981 DISTRICTS				1991 DISTRICTS [1]			
Minority Rep.	District No.	% Black Pop.	VI	Minority Rep.	District No.	% Black Pop.	VI
	41	2.3	54.18(MD)	V. Sykes	44	43.0	72.21(SD)
V. Sykes (elected for 5 terms)	42	35.2	58.64(SD)		45	6.0	44.91(MR)
	43	2.9	46.57(MR)		46	1.3	43.06(MR)
	44	9.0	46.43(MR)		47	6.2	59.99(SD)
	69*	9.0	57.32(MD)		48*	9.6	51.35(XD)
			3 D's 2 R's				3 D's 2 R's

[1] Closest Correspondent of District 42
42-44

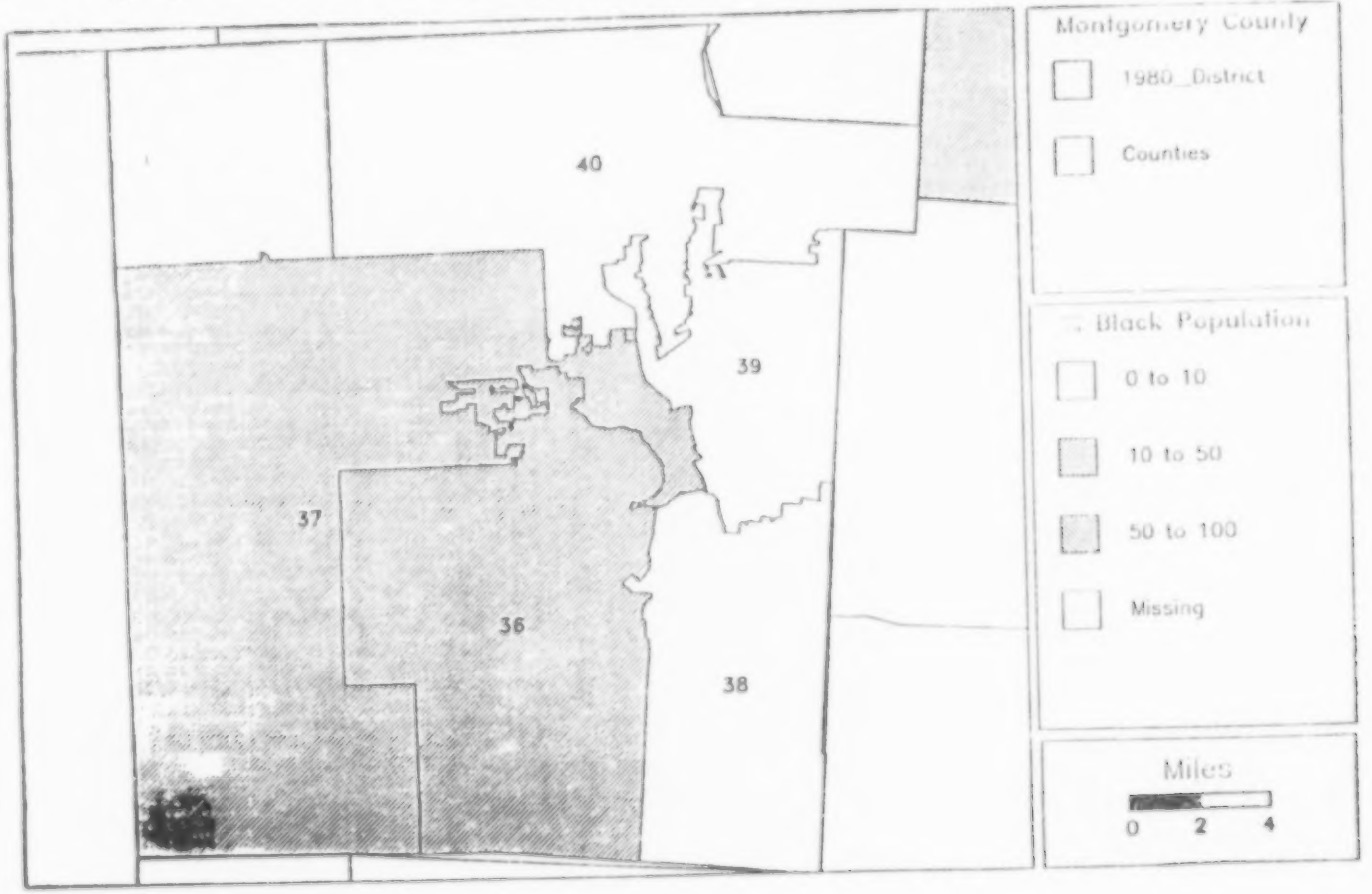
* Only partly in Summit County

1981 House Districts
Percentage of Black Population

Dist. 36 42.1% (McLin)
37 36.1% (Roberts)
38 0.9%

Dist. 39 4.7%
40 6.2%
68* 1.6%

*Only partly in Montgomery Cty.

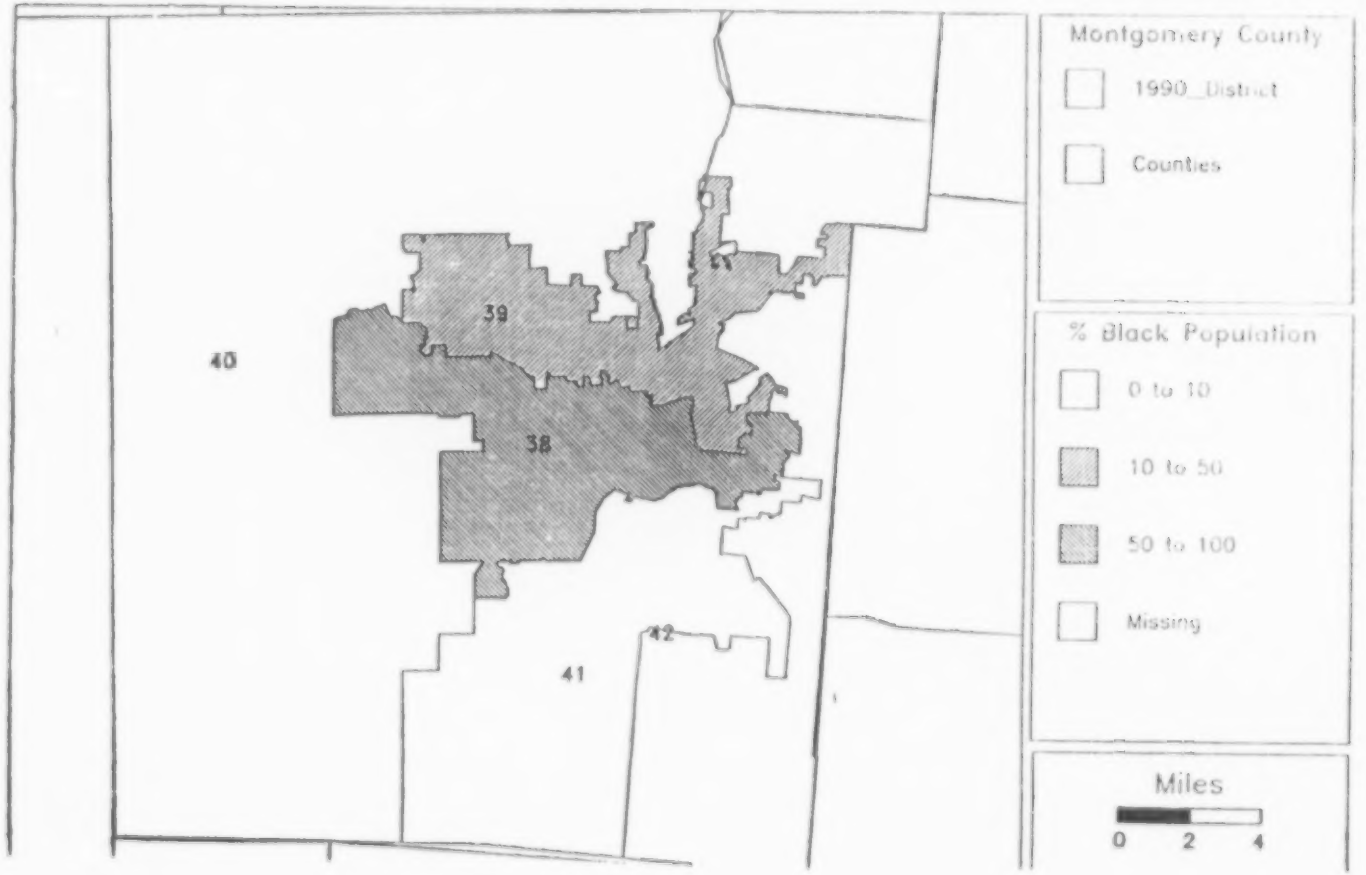


1991 House Districts
Percentage of Black Population

Dist. 38 54.6% (McLin)
39 32.2% (Roberts)
40 3.3%

Dist. 41 1.1%
42 2.8%
43* 3.8%

*Only partly in Montgomery Cty.



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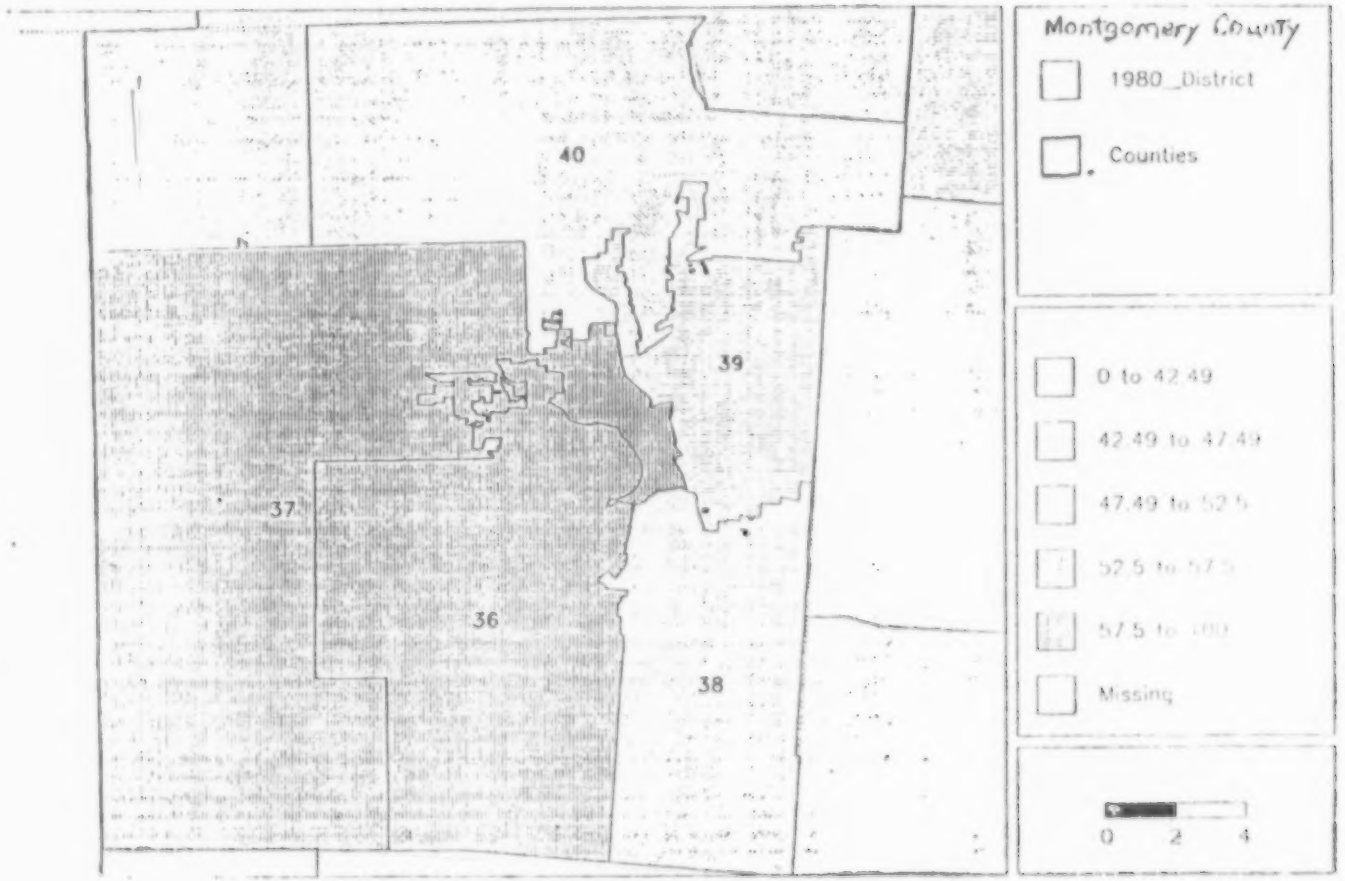
1981 House Districts

.Voting Index

Dist. 36 64.40 (SD)
37 62.52 (SD)
38 36.57 (SR)

Dist. 39 51.67 (XD)
40 43.30 (MR)
68* 41.60 (SR)

*Only partly in Montgomery Cty.



MONTGOMERY COUNTY

1981 DISTRICTS				1991 DISTRICTS [1]			
Minority Rep.	District No.	% Black Pop.	VI	Minority Rep.	District No.	% Black Pop.	VI
R. McLin (elected for 2 terms)	36	42.1	64.40(SD)	R. McLin	38	54.6	75.63(SD)
T. Roberts (elected for 4 terms)	37	36.1	62.52(SD)	T. Roberts	39	32.2	64.40(SD)
	38	0.9	36.57(SR)		40	3.3	45.34(MR)
	39	4.7	51.67(XD)		41	1.3	40.55(SR)
	40	6.2	43.30(MR)		42	2.8	39.77(SR)
	68*	1.6	41.60(SR)		43*	3.8	43.96(MR)
			3 D's 3 R's				2 D's 4 R's

[1] Closest Correspondence of Districts 36 and 37
36-38
37-39

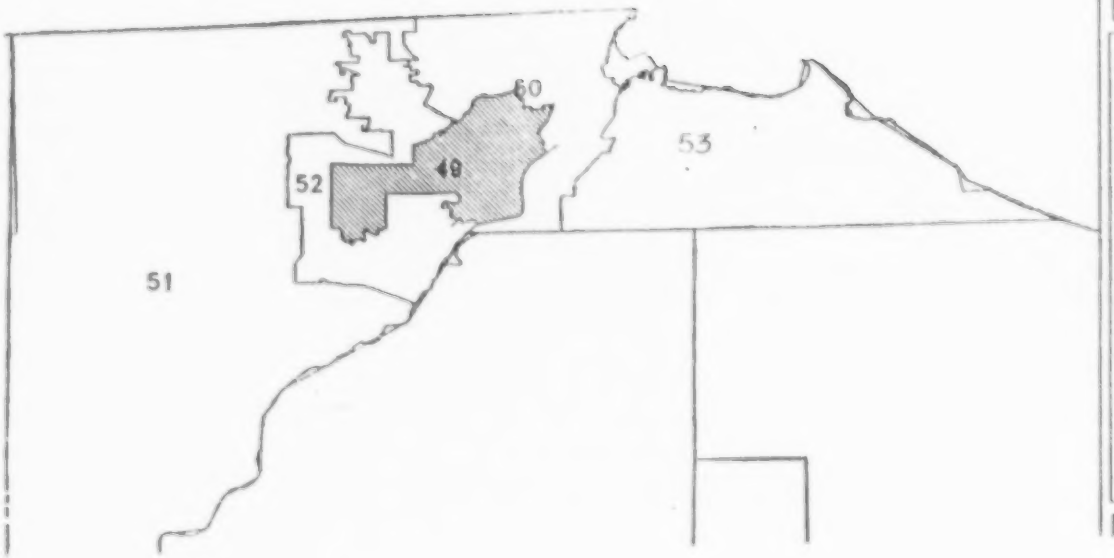
* Only partly in Montgomery County

1991 House Districts

Percentage of Black Population

Dist. 49 50.6% (Jones)
50 5.4%
51 2.4%
52 5.6%
53* 6.0%

*Only partly in Lucas Cty.



Lucas County

1990_District

Counties

% Black Population

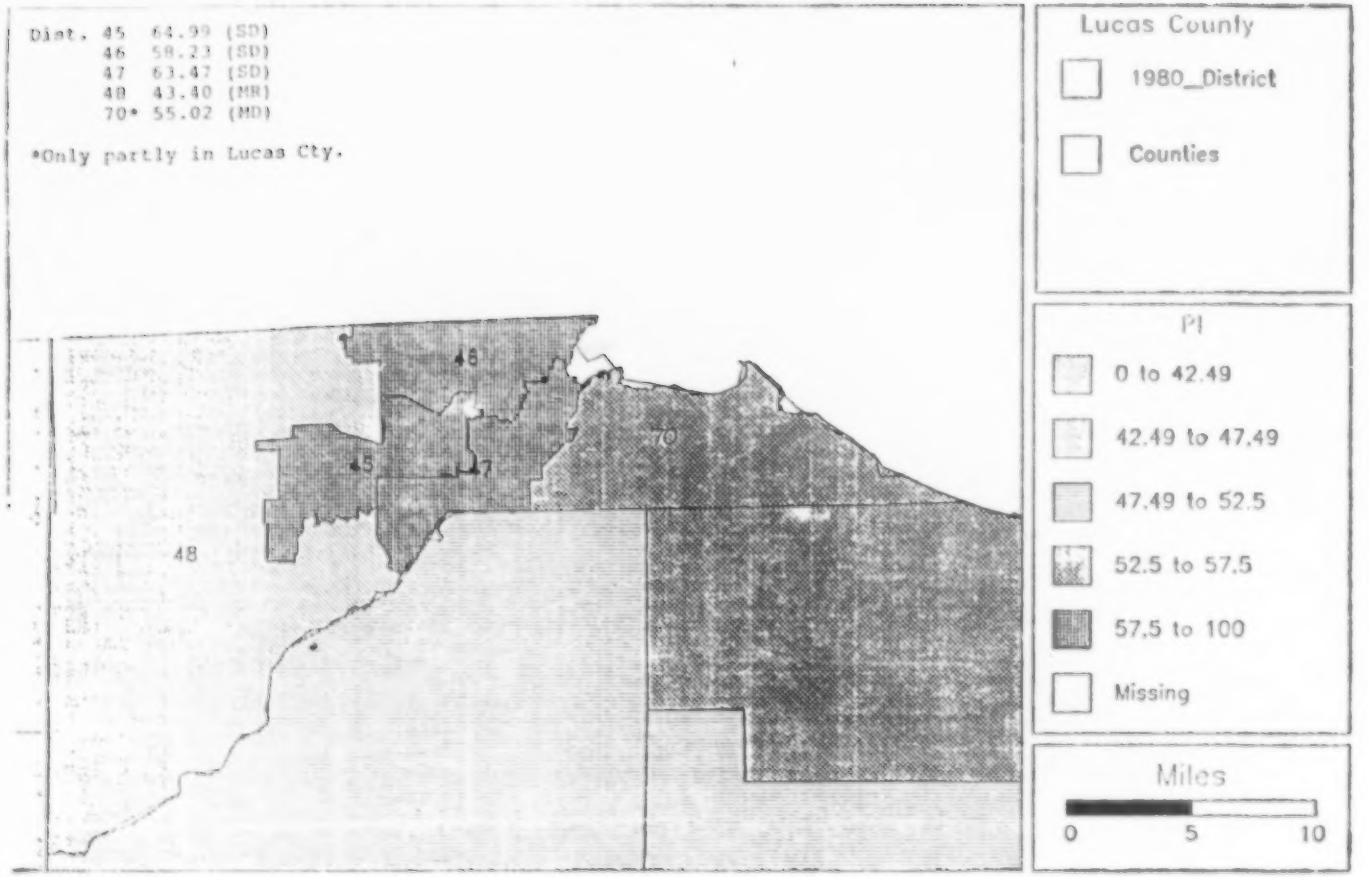
0 to 10

10 to 50

50 to 100

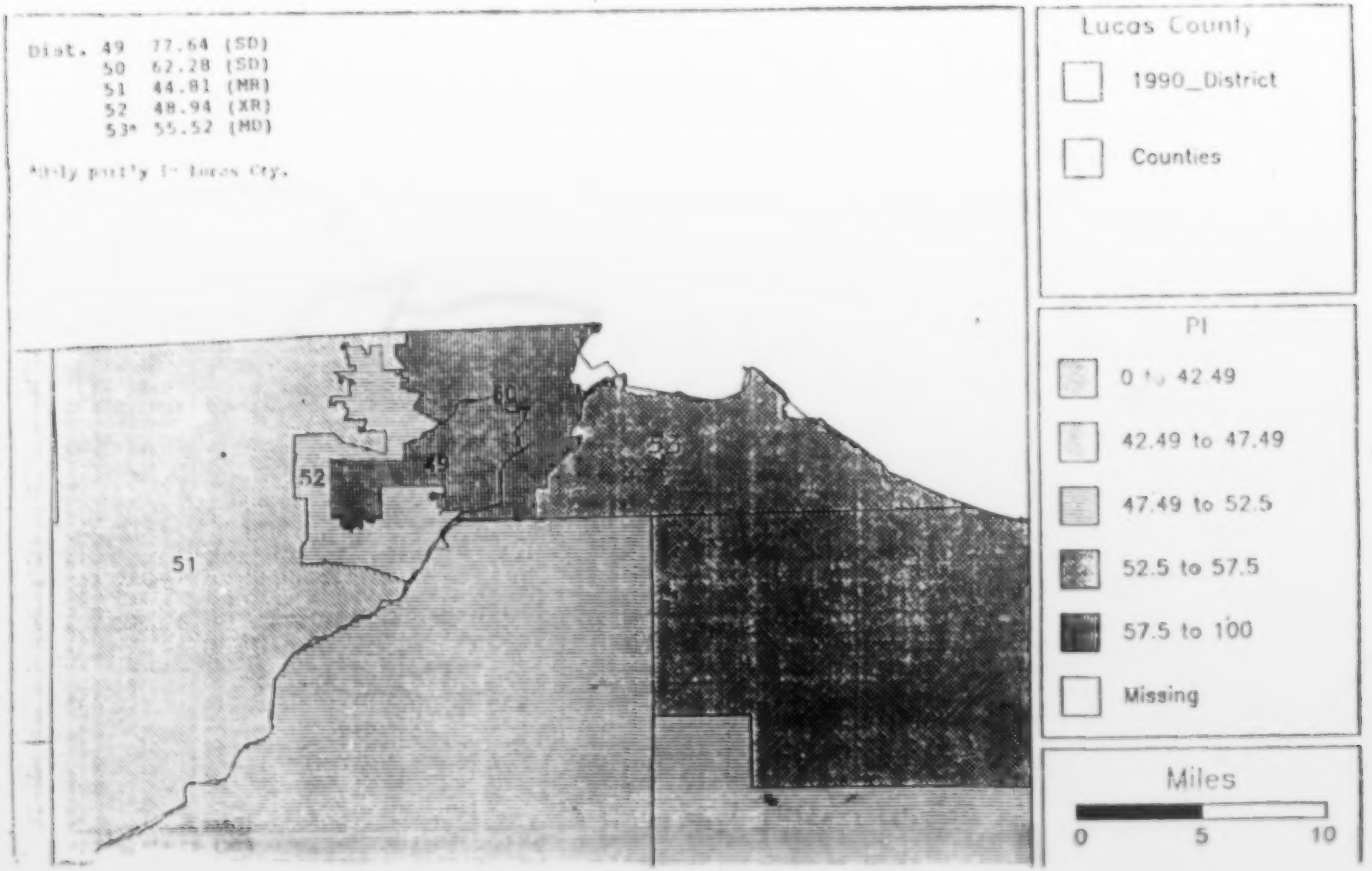
Missing

1981 House Districts
Voting Index



1991 House Districts

Voting Index



DEPOSITION OF DANA MATTISON
(December 11, 1991)
[Docket #108]

[17] Q. In connection with the matter of responsiveness, Mr. Mattison, I'm going to ask that this document be marked, please. I'm not sure what the Exhibit No. would be—

MR. COLLIER: Do you have any more copies?

MR. GILLIAM: No. If you want to get a quick copy of that, I'd appreciate it.

[18] (Exhibit marked for identification.)

Q. Mr. Mattison, I placed in front of you Mattison Deposition Exhibit 5 which contains seven pages beginning with 113th General Assembly and going through the 119th General Assembly and appears to contain a listing of various House bills, House joint resolutions.

Can you tell me what this is.

A. This is a list of key bills that we believe represents key issues facing the African-American community and parts of a legislative agenda that the Black Elected Democrats of Ohio initiated over four years ago. We have a written document called "The Black Agenda '86" that was the result of a key informant survey that we did again over four years ago and I actually wrote the Black Agenda, so I'm the person who actually pulled the document together.

We wrote that document in an effort to try and identify key legislative and public policy initiatives that the caucus would undertake in the upcoming four years and that in fact was the case. These particular bills were in part the result and I say in part because some of the bills unfortunately didn't get out of committee, that kind of thing, which wouldn't be reflected here, so you won't see everything that we identified in the Black Agenda but everything you see [19] here is in the Black Agenda. Okay.

Q. Would these bills be a fair test of the responsiveness of legislators to the Black Agenda you have identified?

A. Yes. We think absolutely it is a key list of bills, again, that represent initiatives and you'll note that most of them were undertaken and unfortunately what you don't have here is co-sponsorship. You got primary sponsors identified, but on almost all of the bills that you have listed here BEDO members either are primary sponsors or key co-sponsors.

Q. And were there votes as you understand it on these bills which could be tabulated?

A. That is my understanding, yes.

* * * *

DEPOSITION OF JOAN W. LAWRENCE
(December 11, 1991)
[Docket #111]

[75] Q. Looking at the "Let's Pretend" document, referring you to Hamilton County—and I understand that you did not read this, but I understand that you were at the seminar.

A. Uh-huh.

Q. And you did cause this package to be sent out?

A. I certainly did.

Q. Is this a portion of the package that you have read?

A. Oh, I think I did, yeah, and I heard his paper.

Q. Okay. And referring you to Hamilton County, it refers to, "In this 'Republican' county the strategy is to 'pack' as much of the Democrat minority as possible into two heavily Democratic districts with black majorities."

Do you know what the goal of doing that was in this hypothetical?

[76] MR. DELEONE: Object.

* * * *

A. Well, clearly, his whole objective here was to create what he was calling a Republican gerrymander. There's no mystery about it.

Q. And I'm just referring to Hamilton County. What he's doing in this hypothetical is packing black majorities into heavily democratic districts?

A. Uh-huh.

MR. DELEONE: Just a minute. If that question is a characterization of the witness's last answer, I object. If it is asking her whether that's what this proposed plan does, then I don't have an objection if she knows.

Q. Referring you now to Franklin County, it states that "Another 'Republican' county where the strategy is similar to that in Hamilton: 'Pack' the Democrats into HDs 29 and 31, each with enhanced black percentages." And that was the same strategy in this hypothetical? Do you know?

A. It seems to be.

MR. DELEONE: Show an objection and a motion to strike the answer.

[77] Q. And then it states, continuing in Franklin County, "Fragment the remaining Democrats into six Republican-dominated districts, eliminating white Democratic incumbents," et cetera and so forth.

A. Uh-huh.

* * * *

[112] Q. Are you aware, Mrs. Lawrence, that many of the ideas contained in Davis Horn's Republican Opportunities document, Exhibit 3, which is his Republican gerrymander, were, in fact, incorporated in the 1991 plan?

A. No.

MR. DELEONE: Just a minute. Don't answer that question. I object.

A. No.

Q. Are you aware of that?

A. No.

Q. Would it surprise you?

A. No it wouldn't surprise me.

MR. DELEONE: Just a minute. I object.

Q. Why wouldn't it surprise you?

A. Wouldn't surprise me because they were obvious. [113] Anyone who is attempting to—

Q. Politically gerrymander—

MR. DELEONE: Object. Let the witness finish her answer.

A. No. Anyone who is attempting to draw a plan is going to see the opportunities that exist, and especially in view of the fact that they had to protect minorities. You know, there were constraints around which the Apportionment Board had to operate, and—

* * * *

DEPOSITION OF GORDON G. HENDERSON
(December 12, 1991)
[Docket #112]

[6] Q. Would you state your name and address for the record.

A. I'm Gordon, middle initial G, Henderson, 220 South 19th Street in Richmond, Indiana.

MR. GILLIAM: Would you mark the document entitled "Curriculum Vitae March 1991" as Henderson Exhibit 1.

* * * *

[8] Q. Are there commonly recognized standards to govern the drawing of redistricting or reapportionment plans?

MR. COLLIER: Objection.

Q. You may answer.

A. Yes.

Q. And what are they?

A. There are four in all. One, you must avoid diluting minority voting strength: two, you must respect the principle of one person, one vote; three, you must respect the principle of compactness; and four, you must respect the principle of contiguity.

* * * *

[9] Q. Now, what is meant by taking care not to dilute minority voting strength?

A. Essentially what that means is that you must avoid either cracking or packing of minority voting strength.

Q. What is packing?

A. Packing is wasting minority vote by creating districts that are overwhelmingly composed of the populations of the minority in question, more so than are needed to enable that minority to either control or to have a measurable impact upon the outcome of elections in that district.

Q. And what is meant by cracking?

A. Cracking also wastes minority vote by [10] dispersing them among two or more districts so that minority voters are much less likely than otherwise to be able to influence the outcome of elections in those districts.

Q. Are you familiar with the term "candidate of choice"?

A. Yes, I am.

Q. What does it mean to you in this context of reapportionment?

A. The candidate of choice is usually used in the context of referring to the minority's candidate of choice and that means the candidate that is preferred or voted for by either a majority or a plurality of minority voters in an election.

Q. How do you determine which candidate gets the largest number of votes from minority voters?

A. There really is only one reliable way to do that and that is to do a bivariate regression analysis which will enable you to tell what percent of different racial groups, for example whites and blacks, vote for particular candidates. When you determine which candidate it is received a majority or the most vote of the population of minority voters, then that candidate is designated the candidate of choice of minority voters.

[11] Q. Is there any other technique that can be used to tell you what percent of a group votes for each candidate running?

A. Not really. Commonly people also perform homogenous precincts analysis, but that's as a backup to the regression analysis.

Q. Is there a name for the study done to determine what percent of whites and blacks vote for each candidate running?

A. Sure. That's called a racial bloc voting analysis, B-L-O-C.

Q. Are racial bloc voting analyses commonly done in connection with the drawing of redistricting plans?

A. Yes. Where there are minority populations involved, yes.

Q. And why is that?

A. Because it is important to respect, as I said, the principle that one not dilute minority voting strength, so therefore you have to know where the minority is, how many there are of them, and what impact upon their ability to choose a candidate of their choice the drawing of district boundaries in a particular location will have.

* * * *

[12] Q. Is it important to know the voting choices of white voters?

A. Yes, it is, because you are likely to find two results on a racial bloc voting analysis. You will find either that there is racial bloc voting or there is coalition voting and whether you find one or the other requires an analysis of the choices of both minority and majority voters.

Q. Has bivariate regression ever been noted in a Supreme Court decision to your knowledge?

MR. COLLIER: Objection.

A. Yes, it has, particularly in the Thornburg case.

Q. Is that Thornburg versus Gingles?

A. Yes.

* * * *

[13] Q. You may answer.

A. The extent of the discussion in that opinion makes it clear to me as a social scientist that bivariate regression is the preferred way to analyze racial bloc voting.

Q. Are you familiar with the case in detail?

A. Yes, I am.

Q. When the minority population happens to be a black population is the candidate of choice of the minority always going to be a black candidate?

A. Absolutely not.

Q. There has been discussion about Jesse Jackson and his race for the presidency in 1988 in this case. Would Jesse Jackson, for example, always be the choice of a black—would he always be the candidate of choice of the minority?

A. No. I testified in federal district court in Alabama that I examined the Democratic presidential primary of 1984 and that in some counties the candidate of choice, i.e. the candidate who won a majority of the black vote was not Jesse Jackson though he was running, but Walter Mondale who is, let me assure you, not a black person.

The question of a candidate of choice is a [14] question for empirical examination using bivariate regression not a matter of assumption or guesswork.

Q. Did you look at Jesse Jackson's vote in any section in Ohio in connection with your employment in this case?

A. Yes. I did.

Q. And what did you learn?

A. I looked particularly at Shaker Heights, Ohio, and I noted there that in that house district, which includes Shaker Heights, Jesse Jackson did extremely well in the Shaker Heights area. He did much less well in the other—in the remaining sections of the district.

Now, my general knowledge of Shaker Heights is that it has a population that is decidedly professional. It includes a small percentage of blacks and it tends to be upper income and from the figures reported by precinct I have a strong impression that Jesse Jackson's support there included—must have included a very substantial number of white voters—white vote—vote per white voters.

MR. GILLIAM: I'm going to come back to that for further detail later, Dr. Henderson.

I'll do it now. Would you mark this next document "Memorandum Re: Jesse Jackson Vote in 1988."

* * * *

[15] Q. And would you tell us what your conclusions [16] were as a result of this examination.

A. Well, the distribution of the Jackson vote particularly that which is described in paragraphs 3 and 5, Paragraph 3 of which indicates he got 21 percent approximately of the vote, but that 80 percent of his vote came from Shaker Heights area and that in three of the precincts in Shaker Heights he received more than 95 percent of the total vote.

Paragraph 7 indicates—I'm sorry, paragraph, the beginning, even before numbered paragraph one, the very first full paragraph indicates that the popuuation of District 18 is 14.72 percent black, but in the precincts of this house district other than Shaker Heights he received considerably less than 14 percent. In about half of those precincts he received less than 5 percent of the vote.

In other words, Shaker Heights gave Jesse Jackson the bulk of his vote in House District 18 and I don't think that that is a—can possibly be taken as an indication of black voting strength in House District 18.

* * * *

[17] Q. Would you identify Exhibit 3 and tell us what it is, please.

A. Exhibit No. 3 presents the results of my racial bloc voting analysis of 11 House districts in the election, general election of 1990 and the election for House District 12 in 1988.

These 11 districts currently are represented in the House by a black person.

Q. And what can you derive from looking at your analysis concerning the existence of significance racial bloc voting or the absence of significant racial bloc voting in the districts that you examined?

A. The data presented here support the following conclusions.

No. 1, there is clear coalitional voting in six of the 11 districts.

Q. And which districts are those?

A. 12, 14—

MR. COLLIER: Just a second, 12, 14—

A.—16, 23, 25, and 31. There is nonsignificant polarized voting in four districts, Nos. 36, 37, 42 and 45. [18] With respect to the 11th district which is District No. 29 the analysis is something of a toss-up because the homogenous precinct analysis shows coalition voting. The bivariate regression analysis shows nonsignificant polarized voting.

Q. You say it is nonsignificant, Dr. Henderson. What's the basis for your statement that the voting where there was any polarization was nonsignificant?

A. For that I really have two criteria: No. 1, I notice that these figures, particularly if you will look down the extreme column on the right that reports support for the democratic and Republican candidates from the bivariate regression, the figures of the percentage of whites voting for the Democratic candidate who in every case is the candidate of choice of black voters is very close to 50. In District 42 its 48.76, in District 37 its 45.98. The lowest it gets is in District 36 where it's still 35.44.

Now, secondly, I also observed that in the first six districts I mentioned the percentage of white voters voting for the Democratic candidate of choice of black voters is really quite high. In District 16 it's almost 68 percent. In District 12 it's 64 percent. That's really overwhelming support. The combination of those two things, the fact that where I have found [19] nonsignificant polarized voting, I call that nonsignificant because the percentage of white voters voting for the candidate of choice of black voters is almost 50.

Finally, regardless of the fact that less than half in these four instances of the white voters voted for the Democratic candidate who was the candidate of choice of black voters, the candidate of choice of black voters handily won in every one of these 11 districts. The fact that there may have been nonsignificant racial voting on

the part of whites did not prevent the election of the candidate of choice of the overwhelming majority of black voters and a solid majority in some instances of very close to a majority in other instances of white voters.

MR. GILLIAM: Would you mark the next document Exhibit 4, please, which is this set. It's entitled "Vote in Districts in which the Black Percent of the Total population was 10 percent or more for the Winning Democratic Candidate for the Ohio House of Representatives in the 1984 General Election."

(Exhibit marked for identification.)

MR. GILLIAM: Let the record reflect that I am stapling together results of "Vote in Districts in which the Black Percent of the Total population was 10 percent [20] or more for the Winning Democratic Candidate for the Ohio House of Representatives in the 1990 General Election," for 1990, election for 1988, for 1986, and for 1984.

Q. Dr. Henderson can you tell me what this exhibit is?

A. Yes, this is an exhibit which I prepared for the districts that you described and the prime concern to me here was to note the correspondence between the black percent of total population and the winning candidate's percent of the vote.

MR. GILLIAM: Would you mark the next exhibit, please, which is Henderson Exhibit 5.

(Exhibit marked for identification.)

Q. Now, Dr. Henderson, with the exception of 1982, is Deposition Exhibit 5 simply another way of presenting the same information for the districts indicated which are black districts as would appear in District 4—I'm sorry, in Exhibit 4?

A. That's correct. The format of the two documents are different, that's all.

Q. And the Deposition Exhibit 5 shows by district the Representative, the Democratic and Republican vote from 1982 to 1990; is that correct?

A. That's correct.

[21] Q. And is this all taken from public information?

A. Yes.

Q. Now, you said in a previous answer that the minority representatives in the 11 districts that you examined were elected by I believe your words were a large plurality or words to that effect.

Is that true—strike that.

What would you call a heavy plurality or a strong plurality?

A. Well, there are many ways that it might be defined properly so, but I noted, for example, that there are a very large number of Democratic—I'm sorry, there are a very large number of House districts in which the Democratic candidate won in which the margin of victory was 67.5 percent or more and by anybody's standards that's got to be counted a very, very substantial win. There are also some Republican districts—I'm sorry, there are also some districts in which the Republican candidate won which were carried by 67.5. So define it how you will.

When I look down a column as I'm looking at, for example, the first page of Exhibit 4, and I see that in District 12 the winning Democratic candidate got 87 percent, in 14 he got 88 percent, in 16 he got 93 percent. Those are overwhelming wins.

[22] Q. I think you noted that in District 42 the population is, the black population is 35.4 percent and the Democratic candidate won 65.5 percent of the vote; is that correct?

A. Yes.

Q. And I believe in District 23 the population is 45.9 percent black and the Democratic candidate won 70.5 percent of the vote, correct?

A. That's right.

Q. In your view what accounts for such success given that in all of these districts the blacks are nowhere near the majority of the population, in 7 of the 11?

A. There has to be substantial white cross-over voting.

Q. And would that be true of districts 23, 29, 42, 49, 43, 48?

A. Yes, it works and, of course, this merely reports data that are totally consistent with the racial bloc voting analysis.

MR. COLLIER: Can we have the question reread, please.

(Question read back.)

Q. And in five of the 11 districts the majority of white voters supported the candidate of choice; is that [23] correct?

MR. COLLIER: Objection.

A. Six.

Q. Six. Thank you. What is the significance of the size of the white cross-over vote in the 11 minority districts?

A. It has two reasons to be considered important. First of all, it is clear evidence of coalitional voting by which I mean that a significant portion of white voters are willing to vote for the candidate of choice of black voters, but considering that we are here on a redistricting matter, the existence rather across the board of substantial white cross-over voting means that the plan drawer must take particular care to avoid packing of minority voting strength.

Finally, the size of the white cross-over vote provides one measure or criterion by which you may assess what the dividing line is between packing and not packing of minority voting strength.

Q. Dr. Henderson, did I ask you to analyze and critique the proposed Republican apportionment plan, 1991 plan for the House of Representatives?

A. Yes, you did.

Q. And what did you do first?

A. Well, I first created a master dataset which [24] included what at the time I considered were all of the data that I would need in order to arrive at this critique and it included, of course, data for the existing plan and for the Republican plan and it included both election and population data.

I then very simply used my SPSS statistical package.

MR. COLLIER: What is that again? ST—

A. SP, as in Peter, SS. It stands for Statistical Package for the Social Sciences. I used that package to develop lists, counts of this, that and the other thing. For example, lists that would enable me to track where each piece of the existing plan that is now in a different district under the 1991 plan came from and where it went.

Conversely, where each piece of the 1991 plan came from and what the characteristics of each of these pieces were and how many of them there were. That's really where I began.

MR. GILLIAM: All right. Let me take a quick break.

(Off the record.)

Q. In your data file did you have both population and election data for the 1981 districts?

A. Yes, I did.

[25] Q. And did you also have the number of the district under the 1981 and the 1991 Republican plan?

A. Yes, I did.

Q. Now, did you check the 1990 census to determine that Ohio had a population of 10,847,115?

A. Yes, I did.

* * * *

[26] Q. What did you do after that?

A. I then looked at really what happened to the old districts under the '81 plan to see how they were treated under the 1991 plan and one of the early things I did was to identify all those districts that had a population

according to the 1990 census within plus or minus 5 percent of the norm and which, therefore, were potential candidates to be moved intact as a district under the '91 plan.

Q. How many of those did you find existed?

A. I found 44 of them.

Q. There are 44 that came within the 5 percent window; is that correct?

A. Right. And then I separated them as to whether they were Democratic leaning or Republican leaning to see how they had been treated and I found that there were 26 in the Democratic category and 18 in the Republican category.

And then I did two more things: I noted—I [27] identified what I called the largest piece. If for example a district under the '81 plan was divided into three pieces, I paid particular attention to whichever the three pieces had the largest population that was moved intact into some district under the '91 plan.

And then, again, I compared the treatment of these largest segments by the plan in the two categories of Democratic leaning or Republican leaning and I discovered two things: I discovered, No. 1, that the average of the largest pieces carried intact into the '91 plan on the Democratic side was approximately 66,000 and I noticed that the average of the largest pieces carried forward on the Republican side was 88,500. In other words, Democratic-leaning districts' populations were decidedly more fragmented than were the populations of those districts that leaned Republican.

MR. GILLIAM: I'm going to ask the reporter to identify the next exhibit as 6.

(Exhibit marked for identification.)

MR. GILLIAM: And while you're at it would you also identify Exhibit 7.

(Exhibit marked for identification.)

Q. Dr. Henderson, would you tell us what Exhibit 6 is, please.

A. Exhibit 6 is the listing of the data for the [28] Democratic-leaning and Republican-leaning districts and at the bottom of each of these two listings you will see the average population of those largest segments opposite the letters MEA, the N was dropped inadvertently, it should say "mean or average," and that's where I got those two figures that I just reported, 65,988 for the Democratic-leaning districts and 88,504 for the Republican-leaning districts.

Q. Why is that—you may have said this, but why is the number 65,000 for Democratic-leaning districts and 88,000 for the Republican districts significant? Why is that important?

A. Because it shows much greater fragmentation of Democratic-leaning districts than Republican-leaning districts.

Q. When you look at the document you have "Number of new districts, old district put in" in a heading; is that correct?

A. Yes.

Q. And what does that heading tell the reader of this document?

A. Well, let's take the first one. House District No. 3, which is the first one listed, was carried intact with its population of 108,276 into one district in the 1991 plan.

[29] District 29 on the other hand was broken up into five pieces and placed in five districts, parts of it, in the 1991 plan. And the largest number of people in any one of those five pieces was the 56,292 listed here.

Q. I see that District 3, which is a Democrat district, is left intact. Is that the only Democratic district that was left intact?

A. Yes.

Q. And were there Republican-leaning districts that were left intact?

A. Yes.

Q. Would those be those districts where the No. 1 appears after them?

A. That's right.

Q. What districts are those, please?

A. Those are districts 1, 5, 79, 80, and 82.

Q. A total of five Republican?

A. A total of five out of the 16, yes.

Q. What criterion did you use to identify a Republican-leaning from a Democratic-leaning district?

A. Whether the Republican or Democratic candidate for the House had carried that district in 1990.

Q. From this document is there evidence that the drawer of the plan treated Democratic- and [30] Republican-leaning districts differently?

MR. COLLIER: Objection.

A. Well, I certainly regard the size of the difference in average populations as substantial and so my answer to your question would be yes.

Q. With respect to breaking up Democratic districts, I want to hand you another exhibit which would be H-3. That will be marked Henderson Exhibit 8.

(Exhibit marked for identification.)

Q. Can you identify this document?

A. Exhibit 8 is the listing that I had SPSS generate in order for me to begin to track the number of pieces that the 1981 districts had been broken up into and that information is reported in the third column from the right for each of the 99 districts of the '81 plan.

Q. And is this the basic back-up information for the Exhibit No. 6 that we have looked at showing what the pieces were?

A. Yes, it is. It's also the back-up for 7.

Q. All right. Now, would you tell the reader of this document what each of these columns means and how they should look at it.

A. Well, this document is basically organized with one entry for each of the 99 districts in the 1981 plan [31] and for each of the—it indicates how many pieces each district was broken up into by the '91 plan and provides for each of those pieces voting for Republican and Democratic candidates for the House in 1990 and notes the black population, notes the Democratic candidates' percent of the total vote, and the black percent of total population and then also reports for each of the 81 districts the percentage of the vote won by the Republican and Democratic candidate for that House seat.

MR. GILLIAM: Would you mark the next document please which is entitled "Vote for Democratic House Candidate in 1990 in Districts in 1981 Districting Plan that are 10 percent or more Black in Population" as Exhibit 9.

(Exhibit marked for identification.)

Q. Can you identify Exhibit 9, please.

A. This lists giving the district numbers in the third column from the right or from the left, the percentage of the vote in each district and the mean or average vote for Democratic candidate in each district that fell in a category defined with respect to its black percent of the population beginning, for example, at the top with those that were 90 percent black or more, then those that were 50 to 89 percent black or more and so on. And in the column second from the left [32] it indicates the number of districts there were in each of those categories.

Q. What is the significance of this exhibit, Dr. Henderson?

A. Well, for one thing, it is still further evidence of how extensive is coalitional voting.

For example, it's impossible not to note that blacks tend to vote for Democratic candidates rather than Republican and, therefore, one cannot be the least bit surprised to

discover that in District Nos. 14 and 15 the average vote given to the Democratic candidate was 93.47 percent, but then you note the next category of which there are two districts in which the black percent of the population is 50 to 89 and the mean vote there is 80.83. Then you begin with districts that have a population that is less than majority black and in the category of 40 to 49 the average Democratic candidate vote was 69.57 which is a landslide by any definition and then all the way down to those districts that were 10 to 19 percent black the Democratic candidate still in those 11 districts received on average 79.74 percent of the vote.

Q. Now, with respect to the issue of—what does cracking mean to you, sir?

A. Cracking means taking a black minority [33] population concentration and dividing it into two or more pieces and putting those pieces into different districts.

Q. Did you find evidence of cracking of black Democratic districts or strongly leaning Democratic districts with a significant black population?

MR. COLLIER: What's the significant black population? Object to the question.

Q. You may answer.

A. Yes, I did.

Q. And did you prepare some exhibits showing that?

A. (Indicating).

Q. All right.

MR. GILLIAM: All right, would you mark the next exhibit please, which would be Exhibit No. 10.

(Exhibit marked for identification.)

MR. COLLIER: We don't seem to have it.

MR. GILLIAM: All right. I'll get that for you.

Q. Dr. Henderson, we have an Exhibit 10 in front of you entitled "Republican- and Democratic-leaning districts compared—how districts in which either Republican or Democratic candidate for the House in 1990 won 67.5% or more of the vote were treated in the 1991 Republican plan."

[34] Would you tell us what your exhibit shows.

A. It shows, first of all, that there were 31 Democratic leaning and 13 Republican leaning such districts and it also separates each of these groups out as to whether their total population was less than 10 percent black or was 10 percent or more black giving us four subject categories which enables us to compare a Democratic-leaning district with a low black population or a Democratic-leaning district with a high black population meaning 10 percent or more with Republican-leaning districts divided into comparable categories with respect to the percentage of their population that is black. And for comparison purposes what it shows is that overall Republican-leaning districts were on average divided into 2.6 pieces whereas Democratic districts were divided into 3.5 pieces. Among Democratic-leaning districts when population was 10 percent or more black those districts were divided into 3.92 pieces and in the Republican category, when the black population was less than 10 percent, they were divided into 2.46 pieces.

In summary, the district most likely to be divided into the maximum number of pieces was a Democratic-leaning district in which the population was more than 10 percent black. The district least likely [35] to be divided into many pieces was a Republican-leaning district in which the percent of the population that was black was less than 10 percent.

Q. Dr. Henderson, I note back on your Exhibit 6 that there were two Republican-leaning districts that were divided into five pieces, is that correct, or perhaps that's a one.

A. Did you say one or two?

Q. I said two but I think there is only one.

A. There is one, right.

Q. What about the one district, how was that treated in terms of cracking compared with the Democratic districts that were in the category as five?

MR. COLLIER: Objection.

A. Two of the Democratic-leaning districts were divided into five pieces and the one Republican-leaning district that was divided into five pieces, the largest segment that moved intact into one of the districts in the '91 plan had more than 57,000 people, the Democratic-leaning districts had 56,000, 36,000 in the largest segments of those two districts that were divided into five pieces. This is more favorable treatment for the Republican-leaning than for the Democratic-leaning districts.

* * * *

[39] MR. COLLIER: Objection, move to strike.

MR. GILLIAM: I object to interrupting the witness. Please finish your answer.

A. Because a test, one test that can be used for a gerrymander is to see whether districts likely to be—to lean toward one party or one group have been created so that that party or group can win them handily as by more than 65 percent of the vote and does not treat [40] districts controlled by the opposite party or group in the same fashion and that's exactly what this exhibit says has been done here.

Q. Is there back-up information to support Exhibit No. 11?

A. Well, it could be assembled as I did from almost any one of the lengthy lists, printouts from the master data file that are already in evidence, as, for example, Exhibit 8. It's a matter of counting it up.

Q. Exhibit 8 is the document which is entitled "Population of and Votes for House Candidate showing where pieces into which 1980 districts were divided were put in the 1991 Republican Plan." Is that right, sir?

A. That's right.

* * * *

Q. Would you describe for the record again what packing is.

A. Yes. Packing is drawing district boundaries in [41] such a fashion that more members of some group, such as blacks, are placed within a district that are necessary given the observed patterns of voting behavior for that group to control or at least to exercise effective influence upon the outcome of elections in that district.

Q. Does the exhibit that we were just looking at, No. 11, does that show evidence of packing of Democrats by Republican majority board?

A. Decidedly so.

Q. Is it significant to you that there are no Republican districts over 65 percent with respect to the index you used?

A. Yes, particularly since there are 16 Democratic districts in that category.

Q. Why is 65 percent such a significant figure to you, Dr. Henderson?

A. Well, I don't really know that it has that great significance, 65, but I could just as well I think say 64 indicates a landslide win by a candidate in that district.

Q. Does the creation of 16 districts of over 65 percent political index favoring Democrats show packing, massive packing of Democratic voters?

MR. COLLIER: Objection, leading.

[42] A. To me it does, yes.

Q. Did you make any determination as to whether or not the Republican plan also packed blacks into districts?

A. Yes, I did.

Q. And is that set forth in a document that you have prepared?

A. Yes.

Q. What is the title of the document?

A. This is "Vote for Democratic House candidate in 1990 in districts in Republican plan that are 10 percent or more black in population."

* * * *

MR. GILLIAM: Would you mark this, please, as [43] Exhibit No. 12.

(Exhibit marked for identification.)

Q. What is Exhibit No. 12, Dr. Henderson?

A. Exhibit 12 provides a listing for districts in the 1991 plan that are 10 percent or more black in population arranged by categories on that criteria, i.e., what percent of the population of the district is black beginning with those four districts in which the population of which is black is greater than 65 and then continuing on as before in categories of 50 to 64, 40 to 49 and so on, down to 10 to 19. And having arranged the districts in that fashion, the really valuable information is found in the right-most column which indicates the average vote for Democratic House candidate in 1990. And it indicates, for example, that in those four districts that were 65 percent or more black in population the Democratic candidate won approximately 87 percent of the vote.

In the next category down those that were 50 to 64, the average vote for Democratic House candidate was almost 83 percent.

But even in those districts in which the population was less—I'm sorry, in which the black population was less than a majority of the population of the district, with only one exception the Democratic [44] candidate for the House did well. That one exception is in the one district in the category of 20 to 29 percent black in population in which the Democratic candidate for the House won 43 percent of the vote.

Even in the five districts in which the percent of the population of black was 10 to 19 the average vote for the Democratic House candidate was almost 60 percent.

Now, it is clear, I think, from these data organized as they are here that you certainly do not need to create districts that are greater than 65 percent and probably don't even have to create them that are 50 percent or more black in order for a Democratic candidate to win. Again, it's because this is just one more way of noting how substantial and important is the white cross-over vote that will support the candidate of choice of black voters.

This, in short, is a good clear example of the packing of black voting strength.

Q. Is there any way that a plan drawer can figure out what percent of a district's population should be black?

A. Yes, there is.

Q. And how would that be done.

A. It really is an empirical inquiry. One would [45] hope that a plan drawer would look at how much cross-over vote there was by a racial bloc voting analysis, would look at turn-out rates, and on that basis arrive at some reasonable rational defenseable approximation of what the cut-off point is between packing and nonpacking of minority voting strength. And I don't know exactly what cut-off point might be precisely derived from just this one exhibit, but it is clear that creating districts that are 50 percent or more black guarantees that you're going to pack minority voting strength on the basis of past electoral behavior.

* * * *

[49] Q. (By Mr. Gilliam) Exhibit 16, Dr. Henderson, would you identify that, please. What's the heading of the document?

A. The heading of this exhibit is "Packing and Cracking of Black Voting Strength in Hamilton County in the 1991 Republican Plan."

Q. All right. And what is Exhibit 15?

A. Exhibit 15 explains the layout of data on Exhibits 16 and 14 and also the meaning of the color coding.

Q. All right. Now, with respect to let's take Exhibit No. 14 which is "Packing and Cracking of Black Voting Strength in Franklin County in 1991" and identifying the color coding, first of all, tell us what that is.

A. All right. The yellow indicates a district or a piece of a district in which the black percent of the population is 10 percent or more.

The green color indicates a district or a piece of a district in which the population is less than 10 percent.

The orange coloring indicates a Democratic-leaning district in which the Democratic [50] candidate won in 1990.

The blue color indicates a district or a piece of a district in which the Republican House candidate won in 1990.

Q. All right. With respect to the first page of Exhibit 14, what can one tell from looking at that page by following the color coding?

A. This tells what happened to each of the districts and each of the pieces of those districts in the 1991 plan, how they were treated in the Republican 1991 plan and thus, for example, if you look in the second column from the left you find four yellow coded districts, 29, 30, 31, and 32, in which the black population was 10 percent or more.

If you then look in the column second from the right you see that the Republican plan created two districts in which the black percent of the population was 10 percent or more.

By the same token, if you look at the 1981 plan you find there four districts that are color coded green meaning the percent of the population black was less than 10 percent, four of them.

If you look at the Republican plan, second column from the right, you find that it creates seven districts in which

the minority—in which the black [51] population is 10 percent—is less than 10 percent.

Politically, in the 1981 plan the Democratic candidate carried five of the districts. Under the 1991 Republican plan the Democratic candidate would carry only three. Under the 1981 plan the Republican candidate carried three of the districts. In the 1991 Republican plan the Republican candidate would carry six.

* * * *

[52] Q. (By Mr. Gilliam) All right. Dr. Henderson, looking at page B of Henderson Exhibit 14, what does that show?

A. This shows what happened in the 1991 Republican plan to each of the four pieces that District No. 28 was divided into.

It shows that the '91 plan took two pieces of the district that had a black population of 10 percent or more and put them into districts in which the black percent of the population was less than 10 percent. And it took two pieces that had a population that was less than 10 percent black and kept them in districts that were less than 10 percent black.

It took a piece of District 28 that had been carried by the Democratic candidate by 65 percent and [53] put it into a district that was now carried by—would be carried by the Democratic candidate with almost 70 percent. It took three pieces that had been won by the Republican candidate and retained them in districts that would also be won by the Republican candidate.

Q. Would you look at page C of the document, please, and tell us what that indicates.

A. This shows what was done with each of the five pieces that District 29 was divided into. It took five pieces each of which had a black population of 10 percent or more and put two of them in the district that was 10 percent black or more and three of them in districts that had black populations of less than 10 percent.

These same five pieces had each been carried by the Democratic candidate and the Republican plan took two of these pieces and put them in districts that would now be won by the Democratic candidate and put the other three pieces in districts that would be carried by the Republican candidate.

Q. Would you look at the next page, D, and tell us what you see on page D, District No. 30.

A. This shows that three of the pieces—I'm sorry, three of the six pieces that District 30 was divided into had majority of 10 percent or more black [54] and they were put in districts—in two districts that are now more than 10 percent black. The third piece was put into a district that is less than 10 percent black. It took three pieces that had a black population of less than 10 percent and retained them in districts that also had a black population of less than 10 percent.

All six pieces had been carried by the Democratic candidate. Under the Republican plan only three of the new districts would be carried by the Democratic. The other three would be carried by the Republican.

Q. And what does page E show with respect to Exhibit No.—with District No. 31.

A. It shows that in the '81 plan two of the pieces were 10 percent or more black and they were retained, moved into districts in the Republican plan that were also 10 percent or more black. Three of them had populations of less than 10 percent black and they were moved into districts that were also 10 percent or less—less than 10 percent black.

Four of the five pieces that District 31 was divided into—let me back up.

In the 1981 plan four of the five pieces were won by the Democratic candidate. In the Republican plan three districts can be won by the Democratic candidate.

[55] Under the '81 plan one district was carried by the Republican candidate. In the Republican plan two districts are.

Q. Two segments are; is that correct?

A. Two districts.

Q. All right, two districts, correct.

All right, go ahead.

A. The next page indicates what happened to the four pieces that District 3[illegible] were divided into. In the '81 plan two of these had populations that were 10 percent or more black. In the Republican plan one district has a population that is 10 percent or more black.

Two of these pieces had populations that were less than 10 percent black and they were placed in districts in the Republican plan that were also 10 percent or less black.

All four of the pieces of the 1981 plan were carried by the Democrats. In the Republican plan these pieces were distributed so that the districts—of the districts they went into only two would be carried by the Democratic candidate.

Q. What does page G show?

A. This shows the treatment of District No. 33 which was divided into four pieces. All four of these [56] had majority, black—had populations that were less than 10 percent black and in the Republican plan these pieces went into four districts which also had populations that were less than 10 percent black. But these four pieces had also all been carried by the Democratic candidate and yet in the Republican plan they were placed in districts, one of which would be carried by the Democratic candidate, the other three would be carried by the Republican candidate.

Q. Go ahead, sir.

A. The next page shows what happened to old District 34. It was divided into three pieces and all three of them had populations that were less than 10 percent black. In the Republican plan these three pieces were put into dis-

tricts all three of which also had populations that are less than 10 percent black. All three of the pieces were carried by the Republican candidate. All three of these districts in the Republican plan are also carried by the Republican candidate.

And finally, on the next page, we see what happened to old District 35. Divided into three pieces each of which pieces has a population that is less than 10 percent black and each of which pieces were carried by the Republican candidate. In the Republican plan [57] these three pieces are carried into three districts, each of which is less than 10 percent black, each of which is carried by the Republican candidate.

Q. What opinion, if any, do you have concerning the "Packing and Cracking of Black Voting Strength in Franklin County in the 1991 Republican Plan"?

A. This document I consider to be a road map detailing how you create a racial gerrymander, and I say that because districts or segments color coded yellow, which represent districts or segments that are 10 percent or more black, are generally under the Republican plan reduced in number. Those districts happen to be, because of the close association between blacks and Democratic support. The districts most likely to be color coded orange meaning they were carried under the '81 plan by the Democrats, and in most instances in the following districts, those numbers are also reduced under the Republican plan.

Color coding of yellow—color coding of green or blue on the left-hand side indicates a Republican opportunity. Color coding of green or blue on the right-hand side indicates a Republican opportunity realized and there is not a single instance in this, on any of the pages of this document in which a Republican opportunity to pack and crack black voting strength and [58] thereby create districts that could be won by the Republicans was missed, not won. Every opportunity was taken and was realized.

* * * *

[59] By Mr. Gilliam:

Q. Dr. Henderson, I'm going to direct your attention again to Exhibit No. 7. I don't believe you've explained that exhibit.

Would you tell us that it is.

A. This is with reference to those 44 districts, 26 of which were classified as leaning Democratic and 18 of which were classified as being—18 of which were classified as being learning Republican and it divides each group into those that were—had populations less than 10 percent black and those that had populations that were 10 percent or more black and it notes the average of the population of the largest segment of the old district moved intact into the 1991 Republican plan.

It shows, for example, that among the 26 Democratic-leaning districts there were eight with populations of 10 percent or more and the average of the largest segment was 60,609.

[60] It shows by contrast that among the Republican-leaning districts there were 15, that's 15 of the 18, with black populations of less than 10 percent and the average of those largest segments was 89,133.

Q. Dr. Henderson, what is the reason why you chose districts with 10 percent more blacks or 10 percent less blacks? Why the 10 percent cut-off figure?

A. It's not a magic figure and it's not 100 percent consistent, but generally speaking if a district has 10 percent or more population it tends to vote for Democratic candidates. If it has a population of less than 10 percent it tends to vote Republican. So there is that really very, very close correlation. It's not 100 percent consistent because, for example, you'll find occasionally a district with 11 percent black population that has voted for Republican, but it probably works at least 95 percent of the itme.

So, in effect, when I identify the populations in this way, within the Democratic-leaning districts, the districts

with black population of more than 10 percent are likely to be the most heavily leaning Democratic districts. And when I identify among the Republican-leaning districts those that have black populations of less than 10 percent I am likely identifying those that are most likely of all to vote [61] for a Republican candidate.

And the whole point really of developing this exhibit was to show that the districts that received the most favorable treatment under the Republican plan, that is to say, where the greatest effort succeeded in keeping the largest number of people together from the old district were in those Republican-leaning districts where the population was less than 10 percent black. Those most likely to be fragmented in the sense that the average of the district segments moved into the new plan was lowest were the most heavily black, the most heavily Democratic-leaning districts, the eight that I've already identified as having a mean population of 60,609.

Q. I want to direct your attention to a document previously marked as Deposition Exhibit Henderson No. 16 entitled "Packing and Cracking of Black Voting Strength in Hamilton County in the 1991 Republican Plan," and would you identify that, please. And tell us what the colors and lines indicate.

A. This document is parallel to Henderson Exhibits 14, and 16. Like 14, takes each of the districts in the 1981 plan and each of the segments into which each of those districts was divided by the 1991 plan and shows what happened to it and its characteristics.

[62] The color code is always the same. The yellow indicates a district that has a black population of greater than 10.

Green means a district that has a black population of less than 10 percent.

Orange indicates a district that voted Democratic.

Blue indicates a district that voted Republican.

And in Hamilton County what you see overall represented by the first page was that the 1981 plan had five

districts in which the population was more than 10 percent black. The 1991 plan has only three.

The 1981 plan had two districts with black populations of less than 10. The 1991 Republican plan has five such districts.

The 1981 plan had four districts which were carried by a Democrat. The 1991 Republican plan has three. The 1981 plan had three districts carried by a Republican. The 1991 plan has five.

So, again, it's like, exactly like Exhibit 14. The green and the blue on the left-hand side represent Republican opportunities, the green and the blue on the right-hand side represent Republican opportunities realized. And the document indicates that almost all of [63] the time Republican opportunities were, in fact, realized and that in order to do this it was accomplished by greatly increasing, for example, look at new District 30, the black percentage of the population and also by cracking of black populations.

Q. Would you turn to page B and tell us what page B shows with respect to District No. 21.

A. This is the treatment accorded to old District 21. It shows that in the '81 plan one segment was more than 10 percent black and in the 1991 plan one segment is still more than 10 percent black.

Two segments were less than 10 percent black in the new plan, two were also less than 10 percent black. Under the old plan two of the segments voted Democratic. In the new plan two of the segments voted Democratic. One in the old plan voted Republican. One in the new plan voted Republican.

Q. All right. What does page C show.

A. This shows the treatment accorded to old District 22. In old District 22, two segments had populations greater than 10 percent black. Two had populations less than 10 percent black. In the new plan two districts have populations greater than 10 percent black. Two have populations less than 10 percent black.

In the old District 22 two of the segments [64] voted Democratic. Two of the segments voted Republican. In the new plan one segment votes Democratic—I'm sorry, in the new plan one district votes Democratic, three districts vote Republican.

Q. And would you explain what D is.

A. This is the treatment accorded to old District 23. It was divided into five segments. All five of the segments had populations that were more than 10 percent black.

In the new plan two of the districts into which two of these segments went have populations that are more than 10 percent black. The other three segments were placed in districts which in the new plan had populations less than 10 percent black.

In old District 23, four of the segments voted Democratic, one voted Republican. In the Republican 1991 plan, these four Democratic segments have been put so that three of them are in districts that are likely to go Democratic and won plus the old segments that was Republican go into Republican districts two of which are likely to remain Republican.

Q. And what does E show.

A. This is the treatment accorded to District No. 24. It, too, was divided into five segments. Three of those were majority black—I'm sorry, were more than [65] 10 percent black. In the new plan they go into three districts which are also more than 10 percent black. Two of the segments in old 24 have populations less than 10 percent black. In the new plan they go into districts which are also less than 10 percent black.

All five segments of old 24 voted Democratic. Two of those five segments go into districts in the new plan that are also Democratic, but three of them go into districts in the new plan that are likely to be Republican.

Q. And what does page F show.

A. This shows the treatment afforded District 25. It was also divided into five segments. Four of those seg-

ments had populations that were 10 percent or more black. In the new plan two of these districts go into—I'm sorry, two of these segments go into districts that are 10 percent or more black. Two of them go into segments that are less than 10 percent black.

In the old plan one of the five segments was less than 10 percent black. It goes into a new district that is also 10 percent black.

All five segments of old District 25 voted Democratic. Three of those five go into districts in the new plan that vote Democratic but the other two go into districts that are likely to be Republican.

[66] Q. All what does J show?

A. This shows the treatment afforded old District 26. Also divided into five segments. One of those segments was 10 percent or more black. It goes into, in the new plan, a district that is more than 10 percent black. Four of the segments in old 26 were less than 10 percent black. One of those four goes into a district that is now more than 10 percent black and three of them go into districts that are less than 10 percent black.

In the old 26, one of the segments went Democratic. It goes into a district in the new plan that also is likely to be Democratic. Four of them were, of the segments, voted Republican and they go into districts which are also likely to be Republican.

Before we leave this page there is one other thing. I think of, under the new plan, Republican District No. 32 as being one of a kind because of the relationship between the yellow and the blue. You will notice that we have now created under the 1991 plan a district that is 23.89 percent black, but it will be carried rather handily by a Republican, the estimate being that the Republican candidate there will get, receive 43.35 percent of the vote. That's a unique relationship. I know of no—I'm sure that there is no other district or segment of the district anywhere which [67] produces Republican strength of that size in a population—with a population

that is that black. More likely is the relationship which you see, it happens to be—

MR. COLLIER: What page are you looking on?

THE WITNESS: G.

MR. COLLIER: House District 32?

THE WITNESS: I'm looking at G.

MR. COLLIER: Are you talking about the new district?

THE WITNESS: Yes, the new 32.

Q. Go ahead, finish your answer.

A. If you want to look through this document or almost any of the other documents that have been introduced in evidence, you're going to be hard pressed to find any other district or segment that is 23.89 percent black that voted anything less than "solidly Democratic." There are no exceptions. There is no other district or segment that is 23.89 percent black that voted Republican. This is a first.

Q. Go ahead and finish your answer with respect to page H.

A. This details the treatment of old District 27 and its three segments. Two of them have populations 10 percent or more black. One of them goes into a district [68] that is more than 10 percent black. One of them goes into a district that is less than 10 percent black. One of the three segments of old 27 was less than 10 percent black. It also goes into a new district with a population that is less than 10 percent black.

All three of the segments in old 27 voted Republican. They are placed into districts in the new plan that are likely to be Republican.

Q. Did you draw a chart entitled "One of a Kind" District No. 32?

A. At one time this exhibit was entitled One of a Kind, but I chose to give this same title to all three of these exhibits and just bring out the one of a kind point verbally.

* * * *

[113] Q. Do you understand that you're presenting your [114] analysis regarding Section 2 of the Voting Rights Act? Is that what you're intending to do?

A. I intended to offer my testimony chiefly as evidence of the general proposition that anyone drawing, engaged in plan drawing must avoid diluting minority voting strength.

Q. That is a good point, anybody engaged in apportionment must avoid minority voter dilution. Is that what I just heard you say?

A. Yes.

Q. And they must do that affirmatively, isn't that true?

A. Well, I don't see how you do it if not affirmatively.

Q. Good. And deliberately, isn't that true?

A. All right.

Q. You agree with that?

A. I can buy that.

* * * *

[117] Q. (By Mr. Collier) And you say you didn't use [118] the 1988 election data in total for all House districts, correct?

A. Just for 12.

Q. Nor did you use '86.

A. Correct.

Q. Nor did you use '84?

A. Right.

Q. Nor did you use '82?

A. I didn't have '82.

Q. Did you have '84, '86, and '88?

A. I had '86 and '88 and I had the Jesse Jackson data for '84.

Q. But you didn't use that in your database?

A. No, it did not go into the database.

Q. How long would it have taken you to put the '86 and '84 data into the database?

MR. GILLIAM: For what purpose?

MR. COLLIER: For the purpose of doing his testimony.

MR. GILLIAM: What testimony?

MR. COLLIER: What have we been doing for the last five hours?

MR. GILLIAM: I don't know what the purpose of your question is.

Q. Can you answer?

[119] MR. GILLIAM: Do you understand the question?

A. It would have taken a while.

Q. How long would it have taken, just roughly?

A. To put exactly what?

Q. The '86 and '88 election results for House races?

A. A week.

Q. Would you have preferred to do that if you had the time?

A. I would have been interested to do some of the House districts in '88. I doubt that I would have had much interest in entering the '86 data.

Q. Why not?

A. Because my concern was to do a racial bloc voting analysis and the population data that must be used in that analysis is 1990 and '86 is getting—is four years away from '90 and you're beginning to find minor problems in finding a relationship.

Q. Do you know what a regression analysis is?

A. Yes, I do.

Q. Doesn't a regression analysis measure correlation between statistical data?

A. It measures a relationship between variables, yes.

Q. Don't you have to do two data points to do a [120] regression analysis?

[120] A. Yes.

Q. Didn't you only have one data point with the 1990 statewide race results?

A. No.

Q. That is for every district that you analyzed you only had the 1990 results, right?

A. I had the 1990 returns and the 1990 BVAP by precincts for each House district.

Q. But you only had one race for each House district with the exception of House District 12 in 1988. You had one snapshot election, right?

A. I'm sorry, I don't follow what you're saying at all.

Q. You had one—you had one set of election data, that is the 1990 results for the House districts, right?

A. That's right.

* * * *

[148] Q. Did you have a list of all black candidates in the 1990 elections?

A. I had a list of those who were incumbent.

Q. But no black candidates?

A. Other than those?

Q. Yes.

A. Not that I was aware of.

Q. So you don't know how many races black candidates lost in 1990?

A. For what?

Q. For House or Senate seat?

A. No, I don't.

Q. You don't know how many blacks attempted to become the nominee of either political party in the primary system, did you?

A. No, I didn't look at the primary system.

Q. You don't know what extent blacks tried to become a candidate in the primary system and were not successful in doing so?

[149] A. I don't follow that question.

Q. You don't know how many occasions that blacks attempted to go through the primary and to become a successful candidate for either major party and were unable to do so?

A. No, I don't.

* * * *

[207] REDIRECT EXAMINATION

By Mr. Gilliam:

Q. Dr. Henderson, you testified earlier that District 20 should be included in Hamilton County; is that correct?

A. Yes.

Q. And does Deposition Exhibit 19, does that include District 20 in Hamilton County?

A. Yes, it does.

Q. And what does the inclusion of District 20 in Hamilton show?

A. It shows that in old District 20 one of the four segments that it was divided into had a population that was more than 10 percent black and which was carried by the Democratic candidate and that segment was moved into a district under the adopted plan that was—that had a population that was more than 10 percent black and that would also be expected to vote [208] Democratic. The remaining three segments had populations that were less than 10 percent black. They voted Republican and they were moved into three districts which similarly all had populations that were less than 10 percent black and were expected to vote, two of which were expected to vote Republican, one of which was expected to vote Democratic.

Q. You testified that concerning the matter of reduction of districts in which there were 10 percent black population or more, in other words, that you were asked questions about whether or not the districts which contain 10 percent black population or more were reduced, you were asked as to whether or not that would make any difference to you.

If you learned that there was a conserted effort, an intentional reduction of black districts around the urban areas which contained 10 percent blacks or more, would that mean anything to you? For example, in Franklin County or Hamilton County, an increase or reduction in the number of black districts containing 10 percent or more.

A. Well, the particular manner in which that is done, which is reflected in Exhibit 14 and I think it's 17, Hamilton and Franklin County.

Q. I think it is 14 and 16.

[209] A. 14 and 16? 14 and 16 is what concerns me because the pattern that you see more often than not is that black majority districts, that is—I'm sorry, black district—districts in the new plan with black populations more than 10 percent tend to be increased which is wasting of votes and concentrated in such districts and this is both a fragmentation and a packing of black voting strength.

Q. We see, for example, in Franklin County the number of districts in which blacks are greater than 10 percent as reduced to two; is that correct?

A. That's part of it. I mean, that is very important on the face of it, but look at the size of the districts that were involved. One of them was 38 percent black, 12 percent black, 47 percent black, 27 percent black. Those are likely to have been substantially, as indeed they were as indicated on the facing page of this exhibit, strongly Democratic districts, and so now this black concentration which was spread among four districts has been collapsed largely into two and concomitantly, as a result, because of the strong relationship between the percentage of a district as a plan and the tendency of that district to vote Republican, the number of likely Republican districts has increased from three to six.

[210] Is this evidence of racial gerrymandering for partisan purposes?

A. Yes, I think it is.

Q. For partisan purposes?

A. Yes, it is.

Q. And is that true of what is shown as Exhibit 14 and Exhibit 16?

A. Yes, it is.

* * * *

[Exhibit 3 to Deposition of Gordon G. Henderson (December 12, 1991)]

Voting in the 1990 General Election for House Candidates in the 11 Districts Represented by Blacks

NOTE: Data for percent of White and Black precincts voting for a candidate are from a homogenous precinct analysis. Data for percent of White and Black voters voting for a candidate and estimates of turnout by race are from a bivariate regression analysis. The procedures used here are identical in every detail to those used by plaintiff's expert, Bernard Grofman, in *Gingles* v. *Edmisten* which in the Supreme Court became the Thornburg case.

Party of Candidates	Total Vote	in Black Precincts	from Black Voters	in White Precincts	from White Voters
District 12	13644				
Democrat	11969	94.41	94.79	66.66	63.71
Republican	1675	5.59	5.21	33.33	36.29
Turnout:	20.80% White 25.87% Black				
District 14	17959				
Democrat	16830	96.65	97.83	57.55	51.65
Republican	1129	3.35	2.17	42.45	48.35
Turnout:	22.51% White 28.33% White				
District 16	23153				
Democrat	21584	93.87	94.36	68.34	67.55
Republican	1569	6.13	5.64	31.66	32.45
Turnout:	26.11% White 34.30% Black				
District 23	20135				
Democrat	14190	94.70	101.09	57.23	50.66
Republican	5945	5.30	−1.09	42.77	49.34
Turnout:	28.23% White 12.63% Black				
District 25	29381				
Democrat	21556	94.55	98.83	50.93	50.93
Republican	7825	5.45	1.17	49.07	49.07
Turnout:	41.02% White 36.10% Black				

Party of Candidates		Total Vote	in Black Pre-cincts	from Black Voters	in White Pre-cincts	from White Voters
District 29		22985				
Democrat		15683	94.24	103.42	51.00	44.50
Republican		7302	5.76	−3.42	49.00	55.50
Turnout:	28.16%	White				
	34.36%	Black				
District 31		23084				
Democrat		16635	95.46	102.17	53.08	50.25
Republican		6449	4.54	−2.17	46.92	49.75
Turnout:	33.05%	White				
	31.30%	Black				
District 36		28162				
Democrat		18129	97.69	101.35	36.57	35.44
Republican		10033	2.31	−1.35	63.43	64.56
Turnout:	31.13%	White				
	36.33%	Black				
District 37		23835				
Democrat		15406	94.55	101.39	47.70	45.98
Republican		8429	5.45	−1.39	52.30	54.02
Turnout:	29.26%	White				
	30.05%	Black				
District 42		29381				
Democrat		19238	95.69	109.63	48.79	48.76
Republican		10143	4.31	−9.63	51.21	51.24
Turnout:	40.22%	White				
	31.38%	Black				
District 45		21501				
Democrat		15536	92.78	97.62	45.41	44.46
Republican		5965	7.22	2.38	44.59	45.54
Turnout:	26.60%	White				
	29.53%	Black				

Distribution of Democratic Partisanship Index
in Republican 1991 Plan

Range in Value of Index	Number of Districts with Index Values in that range
>75	7
65-74.9	7
55-64.9	13
45-54.9	37
35-44.9	35
25-34.9	0
<25	0

[Exhibit 4 to Deposition of Gordon G. Henderson (December 12, 1991)]

Vote in Districts in which the Black Percent of the Total population was 10 percent or more for the Winning Democratic Candidate for the Ohio House of Representatives in the 1990 General Election.

House District Number	Black % of Total Population	Winning Democratic Candidate	Vote of Winning Candidate	Winning Candidate's % of Vote
12	74.80	Troy Lee James	12897	86.69
14	90.07	C J Prentiss	17845	88.61
15	34.91	Jane L. Campbell	23079	77.18
16	94.63	Vermel M. Whalen	22952	92.82
17	26.02	Suzanne M. Bergansky	25571	73.80
18	14.72	Judy B. Sheerer	28956	73.96
19	14.36	Ronald Suster	20761	58.41
23	45.92	William L. Mallory	14190	70.47
24	32.26	Terry M. Tranter	18863	67.54
25	53.19	Helen Rankin	21556	73.37
29	38.49	Ray Miller	16762	67.91
30	12.42	Mike Stinziano	15139	70.83
31	46.79	Otto Beatty, Jr.	17908	71.55
32	26.61	Dean Conley	17641	63.07
36	42.07	Rhine L. McLin	19488	64.88
37	36.13	Tom Roberts	16389	64.48
42	35.39	Vernon Sykes	19235	65.49
45	41.72	Casey Jones	17268	67.12
47	13.23	Barney Quilter	15444	76.04
50	14.88	William J. Healy	18590	58.08
52	10.48	Joseph J. Vukovich	31289	79.51
53	27.78	Robert F. Hagan	26465	81.07
59	12.82	Michael G. Verich	23044	76.31
62	11.35	David Hartley	15494	53.52

Vote for the Democratic Candidate for the Ohio House of Representatives in the 1988 General Election in Districts in which the Black Percent of the Total population was 10 percent or more.

House District Number	Black % of Total Population	Winning Democratic Candidate	Vote of Winning Candidate	Winning Candidate's % of Vote
12	74.80	Troy Lee James	18818	88.86
14	90.07	Ike Thompson	26074	100.00
15	34.91	Jane L. Campbell	31249	81.56
16	94.63	Vernell M. Whalen	26243	100.00
17	26.02	Suzanne M. Bergansky	32451	74.02
18	14.72	Judy B. Sheerer	37009	100.00
23	45.92	William L. Malory	19969	68.46
24	32.26	Terry M. Tranter	24059	65.14
25	53.19	Helen Rankin	30149	76.98
29	38.49	Ray Miller	20891	71.07
30	12.42	Mike Stinziano	19379	69.89
31	46.79	Otto Beatty, Jr.	23425	74.16
45	41.72	Casey Jones	25546	75.74
47	13.23	Barney Quilter	23284	100.00
52	10.48	Joseph J. Vukovich	38260	100.00
53	27.78	Robert F. Hagan	33582	100.00
59	12.82	Michael G. Verich	31754	100.00

Vote in Districts in which the Black Percent of the Total population was 10 percent or more for the Winning Democratic Candidate for the Ohio House of Representatives in the 1986 General Election

House District Number	Black % of Total Population	Winning Democratic Candidate	Vote of Winning Candidate	Winning Candidate's % of Vote
12	74.80	Troy Lee James	13648	89.27
14	90.07	Ike Thompson	16603	83.13
15	34.91	Jane L. Campbell	22442	100.00
16	94.63	Vermel M. Whalen	18019	100.00
17	26.02	Leroy D. Peterson	21931	70.58
18	14.72	Judy B. Sheerer	28307	100.00
19	14.36	Ronald Suster	23460	76.30
23	45.92	William L. Mallory	13179	69.57
24	32.26	Terry M. Tranter	17437	64.71
25	53.19	Helen Rankin	19773	69.99
29	38.49	Ray Miller	16941	70.14
30	12.42	Mike Stinziano	14298	69.09
31	46.79	Otto Beatty, Jr.	18823	71.85
32	26.61	Dean Conley	16738	62.77
36	42.07	C. J. McLin	19630	70.38
37	36.13	Tom Roberts	16648	63.94
42	35.39	Vernon Sykes	18927	65.51
45	41.72	Casey Jones	17676	73.31
47	13.23	Barney Quilter	14888	100.00
50	14.88	William J. Healy	16491	51.94
52	10.48	Joseph J. Vukovich	28535	100.00
53	27.78	Robert F. Hagan	20912	62.56
59	12.82	Michael G. Verich	23969	100.00
62	11.35	David Hartley	16110	55.94

Vote in Districts in which the Black Percent of the Total population was 10 percent or more for the Winning Democratic Candidate for the Ohio House of Representatives in the 1984 General Election.

House District Number	Black % of Total Population	Winning Democratic Candidate	Vote of Winning Candidate	Winning Candidate's % of Vote
12	74.80	Troy Lee James	23025	88.54
14	90.07	Ike Thompson	31653	94.02
15	34.91	Jane L. Campbell	31010	74.83
16	94.63	John D. Thompson	30785	91.38
17	26.02	Leroy D. Peterson	29457	69.03
18	14.72	Judy B. Sheerer	31242	66.27
19	14.36	Donald Suster	31879	74.98
23	45.92	William L. Mallory	23951	70.94
24	32.26	Terry M. Tranter	23562	58.28
25	53.19	Helen Rankin	29674	66.03
29	38.49	Ray Miller	21366	63.59
30	12.42	Mike Stinziano	20445	65.08
31	46.79	Otto Beatty, Jr.	25313	67.81
32	26.61	Dean Conley	20275	58.14
36	42.07	C. J. McLin	26359	63.23
37	36.13	Edward J. Orlett	23968	66.10
42	35.39	Vernon Sykes	30204	69.54
45	41.72	Casey Jones	26998	68.86
47	13.23	Barney Quilter	23860	73.75
50	14.88	William J. Healy	28991	66.30
52	10.48	Joseph J. Vukovich	37432	76.66
53	27.78	Thomas P. Gilmartin	35783	100.00
59	12.82	Michael G. Verich	31988	76.57
62	11.35	David Hartley	22674	56.73

[Exhibit 5 to Deposition of Gordon G. Henderson
(December 12, 1991)]

FRANKLIN COUNTY

District 29—Ray Miller's District (6 terms)

	1990	1988	1986	1984	1982
Democrat	16,762	20,891	16,941	21,366	19,227
Republican	7,922	9,204	7,212	12,232	10,155

District 31—Otto Beatty's District (7 terms)

	1990	1988	1986	1984	1982
Democrat	17,908	23,425	18,823	25,313	22,360
Republican	7,120	8,163	7,374	12,017	9,400

HAMILTON COUNTY

District 23—William Mallory's District (13 terms)

	1990	1988	1986	1984	1982
Democrat	14,190	19,969	13,179	23,951	15,068
Republican	5,945	9,198	5,765	9,812	6,632
Libertarian					594

District 25—Helen Rankin's District (8 terms)

	1990	1988	1986	1984	1982
Democrat	21,556	30,149	19,773	29,674	20,688
Republican	7,825	-0-*	8,477	15,263	11,191
Candidate Ahrens		9,016			
Libertarian					620

CUYAHOGA COUNTY

District 12—Troy Lee James' District (13 terms)

	1990	1988	1986	1984	1982
Democrat	12,897	18,818	13,648	23,025	19,360
Republican	1,905	2,360	1,640	2,981	2,303
Write In	75				

* No Candidate

District 14—C.J. Prentiss' District (1st term)

	1990	1988	1986	1984	1982
Democrat	17,845	26,074 (Dee Thompson)	16,603 (Ike Thompson)	31,653	20,877
Republican	1,356	-0-*	1,094(R?)	2,015	972
Independent	938				
Candidate Tasin			2,275		
Candidate Allmond					1,107
Candidate Britt					640
Candidate Head					2,583

District 16—Vermel Whalen's District (4 terms)

	1990	1988	1986	1984	1982
Democrat	22,952	26,243	18,019	30,785 (John Thomson)	27,954
Republican	1,776	-0-*	-0-	2,905	1,367

* No Candidate

LUCAS COUNTY

District 45—Casey Jones' District (12 terms)

	1990	1988	1986	1984	1982
Democrat	17,268	25,546	17,676	26,998	22,264
Republican	6,706	8,181	5,690(R?)	9,745	6,484
Independent	1,753				
Candidate McCloud			1,079		
Candidate Friedman				2,462	

SUMMIT COUNTY

District 42—Vernon Sykes' District (5 terms)

	1990	1988	1986	1984	1982
Democrat	19,235	23,697	18,927	30,204	20,227 (Pete Crossland)
Republican	10,135	15,588	9,966	13,227	11,115

MONTGOMERY COUNTY

District 36—Rhine McLin's District (2 terms)

	1990	1988	1986	1984	1982
Democrat	19,488	27,974 (C.J. McLin)	19,630	26,359	21,973
Republican	10,548	-0-*	8,260	15,331	8,653
Candidate Moore		10,164			

District 37—Tom Roberts' District (4 terms)

	1990	1988	1986	1984	1982
Democrat	16,389	15,829	16,648	23,968 (Edward Orlett)	19,675
Republican	9,030	-0-*	9,391	12,294	8,240
Libertarian					672

* No Candidate

[Exhibit 6 to Deposition of Gordon G. Henderson (December 12, 1991)]

Districts with 1991 Populations Within 5% of Norm:
Largest Segment of Population of Old District
Remaining in Same District in Republican Plan

Repub or Demo Leaning	House District in 1980 Plan	Repub or Demo Leaning	Chan	Number of New Districts Old District Put in	Total Population 1990
D	3	D	N	1	108276
	7	D	Y	2	80484
	10	D	Y	3	75703
	13	D	Y	4	37507
	17	D	Y	3	44686
	29	D	Y	5	56292
	32	D	Y	4	48228
	37	D	Y	3	53931
	39	D	Y	5	36243
	41	D	Y	3	50561
	42	D	Y	4	54760
	43	D	Y	2	58254
	45	D	Y	3	61414
	46	D	Y	4	71318
	49	D	Y	3	56268
	50	D	Y	2	86732
	54	D	Y	2	77677
	62	D	Y	2	78828
	67	D	Y	2	94950
	69	D	Y	3	49468
	85	D	Y	2	102589
	89	D	Y	2	80327
	91	D	Y	3	57090
	94	D	Y	3	53941
	95	D	Y	2	68276
	97	D	Y	3	71886
Sum					1715689
Means					65988
R	1	R	N	1	109755
	5	R	N	1	113269
	6	R	Y	2	106960

Repub or Demo Leaning	House District in 1980 Plan	Repub or Demo Leaning	Chan	Number of New Districts Old District Put in	Total Population 1990
	22	R	Y	4	89196
	44	R	Y	5	57119
	61	R	Y	2	91674
	65	R	Y	2	106118
	68	R	Y	3	72159
	74	R	Y	3	93244
	75	R	Y	4	34161
	76	R	Y	3	83783
	79	R	N	1	114784
R	80	R	N	1	113879
	81	R	Y	2	71272
	82	R	N	1	114875
	90	R	Y	3	47870
	93	R	Y	2	101442
	96	R	Y	3	71505
Sum					1593065
Means					88504
Sum					3308754
Means					75199

[Exhibit 7 to Deposition of Gordon G. Henderson (December 12, 1991)]

Noting Treatment Under the 1991 Republican Plan of Major Segments of all 44 Districts in the 1981 Plan that had Potential to be used Intact as Districts Under a New Plan sorted according to (1) their Partisan Leaning and (2) the Percent of their Population Below and Above 10% Black

(N=44)

Democratic Leaning Districts		65,988
1981 Districts with Black Population of Less Than 10%:		
Mean population of largest segment of old District moved Intact into 1991 Plan (N=18)	68,379	
1981 Districts with Black population of More Than 10%:		
Mean population of largest segment of old District moved Intact into 1991 Plan (N=8)	60,609	
Republican Leaning Districts		88,504
1981 Districts with Black population of Less Than 10%:		
Mean population of largest segment of old District moved Intact into 1991 Plan (N=15)	89,133	
1981 Districts with Black population of More than 10%:		
Mean population of largest segment of old District moved Intact into 1991 Plan (N=3)	85,357	

[Exhibit 9 to Deposition of Gordon G. Henderson (December 12, 1991)]

Vote for Democratic House Candidate in 1990 in Districts in 1981 Districting Plan that are 10 percent or more Black in Population
(N=27)

Black % of Population	Number of Districts	District Numbers	% of 1990 vote Won by Democratic House Candidate		Mean Vote for Democratic House Candidate
>90	2	14, 15	93.71	93.22	93.47
50-89	2	12, 15	88.29	73.37	80.83
40-49	4	23, 31	70.47	72.06	69.57
		36, 45	64.38	72.26	
30-39	5	15, 24	77.79	67.54	68.74
		29, 37	68.25	64.63	
		42		65.48	
20-29	3	17, 32	75.73	63.28	73.44
		53		81.31	
10-19	11	1, 18	31.58	74.61	79.74
		19, 22	58.27	43.11	
		27, 30	34.35	71.04	
		47, 50	76.06	58.47	
		52, 59	79.64	76.31	
		62		53.52	

[Exhibit 10 to Deposition of Gordon G. Henderson (December 12, 1991)]

Republican- and Democratic-leaning districts compared—how districts in which either Republican or Democratic candidate for the House in 1990 won 67.5% or more of the vote were treated in the 1991 Republican plan

Number of such districts won by Democratic in 1990		31
Mean number of pieces these districts were divided into in Republican plan		3.5
Mean number of pieces when Black population was less than 10%	2.79	
Mean number of pieces when Black population was more than 10%	3.92	
Number of such districts won by Republican in 1990		13
Mean number of pieces these districts were divided into in Republican plan		2.6
Mean number of pieces when Black population was less than 10%	2.46	
Mean number of pieces when Black population was more than 10%	3.33	

[Exhibit 12 to Deposition of Gordon G. Henderson (December 12, 1991)]

Vote for Democratic House Candidate in 1990 in Districts in Republican Plan that are 10 percent or more Black in Population (N=20)

Black % of Population	Number of Districts	District Numbers	% of 1990 vote Won by Democratic House Candidate		Mean Vote for Democratic House Candidate
>65	4	8, 9	83.02	84.21	86.79
		10, 12	88.93	91.00	
50-64	5	21, 30	83.73	80.76	82.66
		31, 38	74.10	90.12	
		49		84.59	
40-49	3	11, 22	82.89	75.34	77.68
		44		74.81	
30-39	2	39, 64	69.88	88.28	79.08
20-29	1	32		43.35	43.35
10-19	5	1, 54	31.58	64.59	59.79
		61, 66	77.09	74.87	
		73		50.82	

[Exhibit 14 (part-page A) to Deposition of Gordon G. Henderson (December 12, 1991)]

Packing and Cracking of Black Voting Strength in Franklin County in the 1991 Republican Plan

#28	5.88% B	38.54% D
1943	14.51%	65.53%
40485	10.69%	37.57%
56978	3.15%	37.16%
16963	2.56%	43.92%
#29	38.49% B	68.23% D
56292	60.17%	83.19%
6339	17.75%	54.82%
25951	11.48%	51.39%
11739	19.71	52.08%
6275	11.73%	59.43%
#30	12.42% B	71.04% D
15033	20.05%	80.26%
8853	30.79%	79.78%
62388	11.38%	74.90%
9919	4.26%	72.20%
16294	8.84%	63.71%
6497	1.19%	55.00%
#31	46.79% B	72.06% D
35282	63.67%	85.26%
41561	53.53%	76.02%
744	3.49%	58.08%
16088	5.00	49.43%
4089	5.01	67.69%
#32	26.61% B	63.28% D
48228	50.44%	77.95%
10992	7.08%	55.63%
38298	6.80%	50.03%
13543	13.60%	52.67%
#33	4.12% B	61.42% D
37363	3.22%	68.07%
6078	2.30%	58.19%
44126	6.35%	57.59%
27548	2.16%	57.08%
#34	5.07% B	27.86% D
63932	2.78%	24.99%
55701	6.60%	30.15%
18319	8.44%	32.88%
#35	1.43% B	26.21% D
29902	2.04%	29.19%
34057	.25%	22.69%
58333	1.21%	27.99

#21	55.67% B	83.73% D
56292	60.17%	83.19%
15033	20.05%	80.26%
35282	63.67%	85.26%
#22	48.03% B	75.34% D
6339	17.75%	54.82%
8853	30.79%	79.78%
41561	53.53%	76.02%
48228	50.44%	77.95%
#23	8.28% B	69.74% D
1943	14.51%	65.53%
62388	11.38%	74.90%
744	3.49%	58.08%
10992	7.08%	55.63%
37363	3.22%	68.07%
#24	4.18% B	33.84% D
38298	6.80%	50.03%
6078	2.30%	58.19%
63932	2.78%	24.99%
#25	8.36% B	40.27% D
25951	11.48%	51.39%
16088	5.00%	49.43%
13543	13.60%	52.67%
55701	6.60%	30.15%
#26	8.54% B	33.57% D
40485	10.69%	37.57%
11739	19.71%	52.08%
18319	8.44%	32.88%
35310	2.42%	25.44%
#27	3.52% B	38.54% D
56978	3.15%	37.16%
6275	11.73%	59.43%
9919	4.26%	72.20%
4089	5.01%	67.69%
29902	2.04%	29.19%
#28	4.28% B	39.72% D
16963	2.56%	43.92%
16294	8.84%	63.71%
44126	6.35%	57.59%
34057	.25%	22.69%
#29	3.70% B	40.87% D
6497	1.19%	55.00%
27548	2.16%	57.08%
58333	1.21%	27.99%
17671	15.24%	61.04%

[Exhibit 15 to Deposition of Gordon G. Henderson (December 12, 1991)]

Explanation of layout on Data Organized by County:

All data on these documents in the left-hand list of data are for districts in the 1981 Plan. Data in the right-hand list of data are for districts in the 1991 Republican Plan.

Look at the first entry of data for a district in the left-hand column of the page. The data listed on one document for District 21 in Hamilton County is as follows:

#21	7.50% B	59.70% D
4722	69.44%	79.38%
87016	4.63%	50.50%
7727	1.98%	46.41%

Those data say that under the 1981 plan, District #21 had a population that was 7.50% Black. Voters in District #21 gave 59.70% of the vote to the Democratic candidate for the House in the 1990 election. The next three lines provide the following data for each of the three pieces into which old District #21 was divided under the Republican 1991 Plan: (1) total Black population in the piece; (2) percent of the total population of that piece that is Black; and (3) the percent of the total vote in that piece won by the Democratic candidate for District #21 in 1990.

Now look at the first entry in the right-hand column which provides data for new District #30 in the Republican 1991 Plan. These data say first that new District #30 has a population that is 60.89% Black and that if the election for the House in 1990 had been held in this new district, the Democratic candidate would have received 80.76% of the vote. Under the 1991 Republican plan, District #30 was assembled from pieces removed from three old districts. The first of these pieces had a total population of 17335 persons, 16.80% of whom were

Black. Voters in this piece of the old House District gave 63.93% of the vote to the Democratic House candidate in 1990.

Legend Explaining Colors:

Yellow—population 10% or more Black

Orange—Democratic House candidate won in 1990

Green—population less than 10% Black

Blue—Republican House candidate won in 1990

[Exhibit 17 (part—page 1) to Deposition of Gordon G. Henderson (December 12, 1991)]

AVERAGE
MINORITY INTEREST INDEX
SCORES

Pct Black	Dem	Rep	Total
0-5	94.1	62.0	77.6
5-10	96.1	70.4	86.5
10-15	95.2	66.1	87.2
15-35	94.8	—	94.8
35-100	97.6	—	97.6
TOTAL	95.3	64.3	83.1

INDEX:

49 Votes of Concern to Minority Community

[Exhibit 19 to Deposition of Gordon G. Henderson (December 12, 1991)]

Packing and Cracking of Black Voting Strength in Hamilton County in the 1991 Republican Plan

Districts in the 1981 Plan

#21	7.50%	B	59.70%	D
4722	69.44%		79.38%	
87016	4.63%		60.50%	
7727	1.98%		46.41%	
#22	12.62%	B	43.11%	D
1335	57.75%		70.89%	
13604	34.61%		56.38%	
3991	8.37%		34.73%	
89196	8.78%		41.09%	
#23	45.92	B	70.47%	D
17335	16.80%		63.93%	
67264	55.54%		75.27%	
4966	55.58%		72.21%	
3253	19.49%		63.55%	
4811	24.26%		48.56%	
#24	32.26%	B	67.54%	D
23823	66.75%		85.11%	
11389	65.76%		73.11%	
14768	54.92%		71.34%	
29130	4.88%		57.74%	
23679	1.01%		56.87%	
#25	53.19%	B	73.37%	D
64031	70.59%		83.10%	
6102	83.05%		91.38%	
4192	20.78%		59.63%	
5707	16.96%		58.73%	
19733	4.88%		50.31%	
#26	2.72%	B	24.78%	D
1349	63.90%		67.80%	
6646	4.74%		22.92%	
1491	5.70%		33.83%	
39906	1.93%		22.67%	
69846	1.73%		25.39%	
#27	12.20%	B	34.25%	D
69406	17.03%		37.57%	
15341	11.32%		31.64%	
31664	2.03%		29.47%	

Districts in the 1991 Plan

#30	60.89%	B	80.76%	D
17335	16.80%		63.93%	
23823	66.75%		85.11%	
64031	70.59%		83.10%	
1349	63.90%		67.80%	
#31	59.64%	B	74.10%	D
13802	61.04%		57.62%	
4722	69.44%		79.38%	
1335	57.75%		70.89%	
67264	55.54%		75.27%	
11389	65.76%		73.11%	
6102	83.05%		91.38%	
#32	23.89%	B	43.35%	D
13604	34.61%		56.38%	
14768	54.92%		71.34%	
6646	4.74%		22.92%	
69406	17.03%		37.57%	
#33	8.01%	B	56.47%	D
16408	8.50%		37.94%	
87016	4.63%		60.50%	
4966	55.58%		72.21%	
4192	20.78%		59.63%	
1491	5.70%		33.83%	
#34	2.60%	B	39.81%	D
89927	1.24%		39.24%	
7727	1.98%		46.41%	
3991	8.37%		34.73%	
3253	19.49%		63.55%	
#35	8.92%	B	39.42%	D
2665	.00%		33.98%	
89196	8.78%		41.09%	
15341	11.32%		31.64%	
#36	4.05%	B	35.81%	D
4811	24.26%		48.56%	
29130	4.88%		57.74%	
5707	16.96%		58.37%	
39906	1.93%		22.67%	
31664	2.03%		29.47%	
#37	2.13%	B	34.50%	D
23679	1.01%		56.87%	
19733	4.88%		50.31%	
69846	1.73%		25.39%	

Exhibit 20 (part-pages 1-21) to Deposition of Robert R. Dykes
[Docket #111]

INCREASE OF HOUSE DISTRICTS IN URBAN AREAS WITH LESS THAN OR EQUAL TO 8.5% BLACK POPULATION UNDER 1991 PLAN

1981 House Districts Black Pop. 8.5%			1991 House Districts Black Pop. 3.5%		
#	County	% Black	#	County	% Black
21	Hamilton	7.5	26	Franklin	8.5
40	Montgomery	6.2	25	Franklin	8.4
70*	Lucas	6.0	23	Franklin	8.3
28	Franklin	5.9	33	Hamilton	8.0
46	Lucas	5.3	14	Cuyahoga	7.9
34	Franklin	5.1	47	Summit	6.2
13	Cuyahoga	5.0	45	Summit	6.0
39	Montgomery	4.7	53*	Lucas	6.0
11	Cuyahoga	4.4	52	Lucas	5.6
9	Cuyahoga	4.1	50	Lucas	5.4
33	Franklin	4.1	36	Hamilton	4.5
43	Summit	2.9	19	Cuyahoga	4.5
48	Lucas	2.8	28	Franklin	4.3
26	Hamilton	2.7	24	Franklin	4.2
7	Cuyahoga	2.4	43*	Montgomery	3.8
41	Summit	2.3	29*	Franklin	3.7
8	Cuyahoga	2.1	27	Franklin	3.5
68*	Montgomery	1.6	40	Montgomery	3.3
35	Franklin	1.4	15*	Cuyahoga	3.2
38	Montgomery	0.9	42	Montgomery	2.8
10	Cuyahoga	0.6	13	Cuyahoga	2.6
6	Cuyahoga	0.5	17	Cuyahoga	2.6
			51	Lucas	2.4
			34	Hamilton	2.1
			37	Hamilton	2.1
			18	Cuyahoga	1.4
			46	Summit	1.3
			41	Montgomery	1.3
			48*	Summit	0.6
			16	Cuyahoga	0.5
			20	Cuyahoga	0.3
TOTAL 22			TOTAL 31		

* Only partly in County listed

REDUCTION OF HOUSE DISTRICTS IN URBAN AREAS
WITH A 10-50% BLACK POPULATION
UNDER 1991 PLAN

1981 House Districts Black Pop. 10%-49%			1991 House Districts Black Pop. 10%-49%		
#	County	% Black	#	County	% Black
31	Franklin	46.8	22	Franklin	48.0
23	Hamilton	45.9	44	Summit	43.0
36	Montgomery	42.1	11	Cuyahoga	42.8
45	Lucas	41.7	64	Mahnoning	35.1
29	Franklin	38.5	39	Montgomery	32.2
37	Montgomery	36.1	32	Hamilton	23.9
42	Summit	35.2	61	Lorain	15.5
15	Cuyahoga	34.9	54	Stark	15.0
24	Hamilton	32.3	66	Trumbull	11.9
53	Mahoning	27.8	73	Clark	11.8
32	Franklin	26.6	1	Allen	11.1
17	Cuyahoga	26.0	TOTAL 11		
50	Stark	14.9			
18	Cuyahoga	14.7			
19	Cuyahoga	14.4			
47	Lucas	13.2			
59	Trumbull	12.8			
22	Hamilton	12.6			
30	Franklin	12.4			
27	Hamilton	12.2			
62	Clark	11.3			
1	Allen	11.1			
52	Mahoning	10.5			
TOTAL 23					

PERCENTAGE POPULATION OF HOUSE DISTRICTS WITH MINORITY REPRESENTATIVES

Current State Representative	1981 House District Number	1981 Percent Black Population	1991 House District Number	1991 Percent Black	Percentage Change
Troy James	12	74.8%	10	67.0%	−7.8
C. J. Prentiss	14	90.1%	8	65.4%	−24.5
Vermel Whalen	16	94.6%	12	67.0%	−27.6
William Mallory	23	45.9%	31	59.6%	+13.8
Helen Rankin	25	53.2%	30	60.9%	+7.7
Ray Miller	29	38.5%	21	55.7%	+17.2
Otto Beatty	31	46.8%	22	48.0%	+1.2
Rhine McLin	36	42.1%	38	54.6%	+12.5
Tom Roberts	37	36.1%	39	32.2%	−3.9
Vernon Sykes	42	35.2%	44	43.0%	+7.6
Casey Jones	45	41.7%	49	50.6%	+8.3

INCREASE OF HOUSE DISTRICTS IN URBAN AREAS WITH A 50% OR GREATER BLACK POPULATION UNDER 1991 PLAN

1981 House Districts Black Pop. > 50%			1991 House Districts Black Pop. > 50%		
#	County	% Black	#	County	% Black
16	Cuyahoga	94.6	10	Cuyahoga	67.0
14	Cuyahoga	90.1	12	Cuyahoga	67.0
12	Cuyahoga	74.8	8	Cuyahoga	65.4
25	Hamilton	53.2	9	Cuyahoga	62.0
			30	Hamilton	60.9
			31	Hamilton	59.6
			21	Franklin	55.7
			38	Montgomery	54.6
			49	Lucas	50.6
TOTAL 4			TOTAL 9		

SUPPORTING DOCUMENTATION FOR PERCENTAGE POPULATION CHARTS

FRANKLIN COUNTY

1981 Districts		1991 Districts	
#	% Black	#	% Black
28	5.9	21	55.7
29	38.5	22	48.0
30	12.4	23	8.3
31	46.8	24	4.2
32	26.6	25	8.4
33	4.1	26	8.5
34	5.1	27	3.5
35	1.4	28	4.3
		29 *	3.7

Closest Correspondence of Districts 29 and 31

29-21
31-22

* Only partly in Franklin County

SUMMIT COUNTY

1981 Districts		1991 Districts	
#	% Black	#	% Black
41	2.3	44	43.0
42	35.2	45	6.0
43	2.9	46	1.3
44	9.0	47	6.2
69 *	9.0	48 *	0.6

Closest Correspondence of District 42

42-44

* Only partly in Summit County

HAMILTON COUNTY

1981 Districts		1991 Districts	
#	% Black	#	% Black
20	8.9	30	60.9
21	7.5	31	59.6
22	12.6	32	23.9
23	45.9	33	8.0
24	32.3	34	2.1
25	53.2	35	8.9
26	2.7	36	4.5
27	12.2	37	2.1

Closest Correspondence of Districts 23 and 25

23-31
25-30

LUCAS COUNTY

1981 Districts		1991 Districts	
#	% Black	#	% Black
45	41.7	49	50.6
46	5.3	50	5.4
47	13.2	51	2.4
48	8.8	52	5.6
70 *	6.0	53 *	6.0

Closest Correspondence of District 45

45-49

*Only partly in Lucas County

MONTGOMERY COUNTY

1981 Districts		1991 Districts	
#	% Black	#	% Black
36	42.1	38	54.6
37	36.1	39	32.2
38	0.9	40	3.3
39	4.7	41	1.3
40	6.2	42	2.8
68 *	1.6	43*	3.8

Closest Correspondence of Districts 36 and 37

36-38
37-39

* Only partly in Montgomery County

CUYAHOGA COUNTY

1981 Districts		1991 Districts	
#	% Black	#	% Black
6	0.5	8	65.4
7	2.4	9	62.0
8	2.1	10	67.0
9	4.1	11	42.8
10	0.6	12	67.0
11	4.4	13	2.6
12	74.8	14	7.9
13	5.0	15 *	3.2
14	90.1	16	0.5
15	34.9	17	2.6
16	94.6	18	1.4
17	26.0	19	4.5
18	14.7	20	0.3
19	14.4		

Closest Correspondence of Districts 12, 14, 15, 16

12-10
14-08
15-09
16-12

* Only partly in Cuyahoga County

1981 HOUSE DISTRICTS WHICH QUALIFY FOR RETENTION UNDER SECTION 7(D) BECAUSE THE 1990 POPULATION FIGURES SATISFY § 3 OF ARTICLE XI

1	61
3	62
5	65
6	67
7	68
10	69
13	74
17	75
22	76
29	79
32	80
37	81
39	82
41	85
42	89
43	90
44	91
45	93
46	94
49	95
50	96
54	97

1981 HOUSE DISTRICTS RETAINED IN THE 1991 PLAN WITH EXACTLY THE SAME BOUNDARIES

1981	1991
1	1
2	5
3	3
5	4
79	82
80	83
82	86

All of these are 7(D) Districts except for District 2 in 1981 and 5 in 1991 which is a whole county district created under Section 9 of Article XI.

1990 POPULATIONS OF 1981 HOUSE DISTRICT
(Counties with more than one House District)

County	Population Below 104,089	Population Between 104,089 and 115,045	Population Above 115,045
Cuyahoga	8, 9, 11, 12, 14, 15, 16, 18, 19	6, 7, 10, 13, 17	—
Hamilton	21, 23, 24, 25	22	20, 26, 27
Franklin	31	29, 32	28, 30, 33, 34, 35
Montgomery	—	37, 39, 68 *	36, 38, 40
Summit	—	41, 42, 43, 44, 69 *	—
Lucas	47, 70 *	45, 46	48
Stark	71 *	49, 50	51
Mahoning	52, 53, 71 *	—	—
Lorain	55, 72 *	54	—
Butler	—	—	56, 57
Trumbull	58, 59	74 *	—
Lake	60	61	—
Clark	—	62, 75 *	—
Portage	—	69 *	63
Richland	64	76 *	—
Greene	—	65, 75 *	—
Clermont	—	—	66, 77 *
Licking	—	67	78 *

* Districts only part of which is in the designated county

SUPPORTING DOCUMENTATION FOR
POLITICAL CHANGE IN LEGISLATIVE
DISTRICTS CHART

	DEM PI SCALE
1 = STRONGLY DEMOCRATIC	57.51+
2 = MODERATELY DEMOCRATIC	52.51-57.50
3 = MARGINAL	47.50-52.50
4 = MODERATELY REPUBLICAN	42.50-47.49
5 = STRONGLY REPUBLICAN	0-42.49

Political Change in Legislative Districts
from 1981 to 1991

Political Affiliation	1981	1991	Net Change
Strong Republican	17 Districts	20 Districts	+3 (Republican)
Moderate Republican	21 Districts (3 democrat/18 republican)	27 Districts	+6 (Republican)
Marginal	19 Districts (16 democrat/3 republican)	18 Districts	−1 (Marginal)
Moderate Democrat	17 Districts	9 Districts	−8 (Democrat)
Strong Democrat	25 Districts	25 Districts	—0—

Strong Republican = 0 to 42.49%
Moderate Republican = 42.50% to 47.49%
Marginal = 47.50% to 52.50%
Moderate Democrat = 52.51% to 57.50%
Strong Democrat = 57.51% or greater

Key—Percentage of Democratic Vote in Each Legislative District Averaged for Each of 5 Statewide Elections in 1990 (*i.e.* Governor, Auditor of State, Secretary of State, Attorney General and Treasurer)

LUCAS COUNTY

1981 Districts			1991 Districts		
#	Dem Pl Scale	Dem Pl	#	Dem Pl Scale	Dem Pl
45	1	64.99	49	1	77.64
46	1	58.23	50	1	62.28
47	1	63.47	51	4	44.81
48	4	43.40	52	3	48.94
70 *	2	55.02	53 *	2	54.52

Closest Correspondence of District 45

45→49

* Only partly in Lucas County

SUMMIT COUNTY

1981 Districts			1991 Districts		
#	Dem Pl Scale	Dem Pl	#	Dem Pl Scale	Dem Pl
41	2	54.18	44	1	72.21
42	1	58.64	45	4	44.95
43	4	46.57	46	4	43.06
44	4	46.43	47	1	59.99
69 *	2	57.32	48 *	3	51.35

Closest Correspondence of District 42

42→44

* Only partly in Franklin County

MONTGOMERY COUNTY

1981 Districts			1991 Districts		
#	Dem Pl Scale	Dem Pl	#	Dem Pl Scale	Dem Pl
36	1	64.40	38	1	75.63
37	1	62.52	39	1	64.40
38	5	36.57	40	4	45.34
39	3	51.67	41	5	40.55
40	4	47.30	42	5	39.77
68 *	5	41.60	43 *	4	43.96

Closest Correspondence of Districts 36 and 37

36→38
37→39

* Only partly in Montgomery County

FRANKLIN COUNTY

1981 Districts			1991 Districts		
#	Dem Pl Scale	Dem Pl	#	Dem Pl Scale	Dem Pl
28	4	45.41	21	1	76.50
29	1	62.97	22	1	69.35
30	2	55.14	23	3	51.92
31	1	66.33	24	5	39.77
32	1	58.02	25	4	43.50
33	4	44.49	26	5	40.56
34	5	39.00	27	4	43.91
35	5	34.27	28	5	39.95
			29 *	5	38.04

Closest Correspondence of Districts 29 and 31

29→21
31→22

* Only partly in Franklin County

HAMILTON COUNTY

1981 Districts			1991 Districts		
#	Dem Pl Scale	Dem Pl	#	Dem Pl Scale	Dem Pl
20	5	40.48	30	1	74.68
21	4	45.80	31	1	69.28
22	4	44.50	32	3	47.69
23	1	65.74	33	4	45.59
24	1	59.91	34	5	39.30
25	1	66.74	35	5	42.45
26	5	35.33	36	5	39.06
27	5	41.31	37	5	40.21

Closest Correspondence of Districts 23 and 25

23→31
25→30

CUYAHOGA COUNTY

1981 Districts			1991 Districts		
#	Dem Pl Scale	Dem Pl	#	Dem Pl Scale	Dem Pl
6	5	40.03	8	1	75.23
7	3	51.03	9	1	72.13
8	2	54.56	10	1	79.04
9	2	57.25	11	1	66.67
10	2	53.07	12	1	78.88
11	1	63.77	13	1	62.75
12	1	80.15	14	2	54.86
13	2	53.36	15 *	5	45.20
14	1	84.83	16	5	39.73
15	1	63.82	17	2	54.98
16	1	87.18	18	5	48.74
17	1	58.70	19	1	57.54
18	2	57.35	20	2	53.27
19	2	55.03			

Closest Correspondence of Districts 12, 14, 15, 16

12→10
14→08
15→09
16→12

* Only partly in Cuyahoga County

DEPOSITION OF ROBERT BENNETT
(December 13, 1991)
[Docket #107]

[12] Q. Did you ever attend any meetings with the Republican National Committee that discussed the creation of the majority minority districts?

A. Yes, I did.

* * * *

[14] Q. What legal issues with respect to the Voting Rights Act were discussed?

A. Oh, there's a number of them. I can't recall them all right now.

Q. And specifically with respect to the creation of majority minority districts what was discussed?

A. It was generally discussed that to comply with the Voting Rights Act that states would be required to look at majority minority districts and also then the issue of influence districts was also discussed.

* * * *

[23] Q. With respect to the three meetings of the Republican National Committee that you've testified to, were there any discussions about the Republican opportunities to gain seats in states across the country?

MR. DeLEONE: Object.

A. Yes.

* * * *

DEPOSITION OF DR. GARY KING
(December 13, 1991)
[Docket #121]

[27] Q. And have you done an estimate of partisan bias for the—for prior Ohio apportionment plans?

A. Yes.

Q. And have you done that for the present Ohio apportionment plan as adopted by the Ohio Apportionment Board?

[28] A. Yes.

MR. BRADEN: At this time I would like to show you a document marked Defendant's Exhibit 88.

(Exhibit marked for identification.)

Q. Are you familiar with this document?

A. Yes.

Q. Could you please explain what this document is?

A. This is a time series plot from 1968 to 1990 of the level of partisan bias in the Ohio State House.

Let me explain first what partisan bias is. Let's just take 1990, for example. If you notice the solid line of 1990, it is at about .05. And what that means is that if the Democrats and the Republicans were to split the vote, average district vote equally in 1990, which they didn't but if they were to split it equally, then the Democrats would receive approximately five percent more votes and the Republicans would receive approximately five percent fewer votes just because of the translation of votes into seats.

So that's a partisan bias in favor of the Democrats. My uncertainty about this is represented in the standard error bounds also printed on this graph, and that is the dotted lines about that solid line. And you can see that both—that since 1972 both the solid line and in most years the dotted lines all appear above [29] the zero level of partisan bias. So that means that the electoral system in the Ohio State House has been consistently

biased in favor of the Democratic Party for quite some time.

What this figure also shows is the change—the quite startling change from before 1970—starting of that change occurred before and after the 1971 redistricting plan, before the '71 districting plan there was Republican bias and after there was Democratic bias. This updates and analyzes the data that appeared in the article of mine to which we have already referred.

MR. BRADEN: At this time I would like to show you a document marked Defendant's Exhibit 89.

(Exhibit marked for identification.)

Q. Could you please describe for us—have you seen this document before?

A. Yes.

Q. Could you please describe for us what this document is and what it shows?

A. This is a similar analysis to Exhibit 88 but this time for the Ohio State Senate. What this shows is that over the entire period studied in this graph the Ohio State Senate has been biased in favor of the Republican Party. Both the line and in most but not all [30] the areas the dotted lines, that is the standard errors, appear below the zero mark. So the Republican Party in most of these years is actually benefitting by the seats/votes translation in this plan.

Actually I should probably just explain a technical point.

Q. Yes.

A. The technical point is since the Ohio Senate—since senators run in staggered terms I used overlapping, I paired the terms. And if you look closely at the bends in this curve, that is where the points were plotted, only appear at odd numbered years where elections obviously don't occur. So what I did on the last point of this graph plotted in 1989, that's—I am using both the class that ran in '88 and the class that ran in '90.

Perhaps we should also explain one other point, and that is that although the points at which the elections occur are the ones in which I estimated it, they are connected just so you can see it clearly. But obviously we have no information on the time that occurs between elections.

Q. Do you have any theory as to why this particular exhibit appears so much different than the prior exhibit? [31] A. I have a theory. It's actually quite interesting from an academic perspective since the 1971 Ohio State House redistricting plan has been so noted as, at least in my work, as such a Democratic gerrymander, that the State Senate, which are just aggregated State House districts, could be biased in favor of the Republicans.

Well, let me give you two hypothetical examples. The first hypothetical example I don't believe applies here and the second does. The first, which might seem more plausible at first, is take three House districts—and just for the record it is three House districts that get aggregated up into a Senate district—if each, if Democrats won each of the House districts by one vote and you aggregate it up to get a Senate district when the Democrat would win by three votes. And so not a single vote would be wasted, it would be just a perfect redistricting plan for the Democrats.

But that's obviously not what happened here so let me give you a different hypothetical example that I think fits. What probably happened in 1971 is that, is something akin to the following hypothetical example, and that is in two of the three districts there was—in two of the three districts the Democrats win by a [32] small margin. In the third district the Republicans win by a hundred percent. So you pack all the Republicans into the third district and win the other two by small margins.

If you aggregate that situation up then the Republican wins the seat. So if you really push the State House redistricting and try to bias it as much as you can in favor of the Democrats, I take it that's what—I take it

as an inference that was what was attempted in 1971—that if you do that then one possible logical consequence of it is bias in favor of the Republicans in the Senate. So it is interesting that Ohio because of this law, because of this provision in the Ohio State Constituton, has a sort of self-correcting mechanism.

Q. In addition to your examination of prior plans adopted by the Ohio Apportionment Board, have you had the opportunity to examine the plan adopted by the Ohio Apportionment Board, sometimes referred to in this litigation as the Tilling plan?

A. Yes.

Q. Do you have an opinion as to whether the Tilling plan could be fairly described as a partisan gerrymander?

A. Yes.

Q. And what is that opinion?

[33] A. That it really could not be described as a partisan gerrymander, either in the House or the Senate.

MR. BRADEN: At this time I would like to provide you with a document marked Defendant's Exhibit 90.

(Exhibit marked for identification.)

Q. Have you seen this document before?

A. Yes.

Q. Could you please describe for us what this document is?

A. Well, let's focus for a second on the lines in the top right-hand corner of this figure.

This figure—the solid line in this figure, all it does is replicate almost exactly the Ohio State House figure, Exhibit 88. So it just moves that line straight onto this graph, and it's only for comparison. So what is labeled current are the current districts from 1984 to 1990. Then what I did is I made predictions, as I described in my method, for 1984 to 1990 if those districts were to run again under these four plans, under the current plan

which I have already described, under the Tilling plan which is the one in question, and also under the Democratic plan and the Republican plan.

Q. Let me interject at this time. These are the [34] plans—are these the plans that were considered by the Apportionment Board, your understanding?

A. Yes.

Q. Thank you. If you could go on and explain this exhibit, please.

A. Looking—continuing to look at the lines, the current line is, as I mentioned in the previous exhibit, is always above zero. So there is consistent Democratic bias. The Democratic line is also consistently above zero, although there is obviously some variation over the four years. It also indicates Democratic bias.

The Tilling plan is sometimes below the line and sometimes above the line. On average it is about on the line. So it is—it is in fact quite a fair plan. The Republican plan is almost a mirror image of the Democratic plan. It is almost always below the line.

I wanted to describe two other features of this graph. First are the standard errors which appear in the left-hand side here, also in the figure before we get to the table. The standard errors are basically—what these lines indicate are plus or minus one standard error and this little diamond point, and that is basically how precisely we know each of these lines. You can see we know the current district lines better than the other lines because we have the data for those,[35] and we had to forecast the other lines.

A summary of this figure appears at the bottom of Exhibit 90. For each of the four plans I present, or this exhibit presents the average partisan bias across these four years, and standard error of the average, which is different than the standard error of individual points.

For the Democratic plan average partisan bias is 2.6 percent. So that means that partisan bias, Democrats are receiving approximately on average 2.6 percent addi-

tional seats over and above what I would describe as fair—if the Democratic plan were to be put into effect.

Current districts which obviously are in effect and were in effect from '84 to '90 were biased in favor of the Democratic Party also, on average by about 3.3 percent. You can see the standard errors for each of these are fairly small, and each of these are more than twice the size of the standard errors.

The Tilling plan is six-tenths—my best guess—six-tenths of a percentage point bias in favor of the Republicans, but it's not even as large as the standard error so we can not statistically distinguish this from zero bias.

The Republican plan, as I mentioned earlier, is [36] a mirror image of the Democratic plan and is biased in favor of the Republican Party by about two percentage points, and it is also statistically and substantively distinguishable from zero.

• • • •

Q. At this time, Dr. King, I would like to show [37] you a document marked Defendant's Exhibit 91.

(Exhibit marked for identification.)

Q. Have you seen that document before?

A. Yes.

Q. Would you please describe for us what that document contains?

A. This is an analogous figure consrtucted for the Ohio State House as Exhibit 90 was for the Ohio State Senate.

The current plan, which is marked C, current, in the top of the figure on the right-hand side is a solid line. And the solid line indicates, as Exhibit 89 did, that there is considerable Republican bias for the years 1984, '86, '88—excuse me, for the Senate districts which ran from '84 to '90. Again I am pairing up the pairs of years so I can get 33 districts.

I also ran it for the three other plans, Tilling plan, Democratic plan and Republican plan. I am going to first

talk about the point estimates and then I will talk about the standard errors. Point estimates are one's best estimate of these lines that appear on the right-hand side.

As I said, the current plan is considerably below the line and is biased in favor of the Republicans. The Republican line is very similar to the [38] current plan and is also considerably biased in favor of the Republicans. The Democratic plan is considerably less biased in favor of the Republicans, and the Tilling plan is also considerably less biased in favor of the Republicans. None of the plans become biased in favor of the Democrats.

Now, before interpreting each of these lines, without putting too much weight on these lines, you focus on the standard errors appearing on the left side of the graph. We're fairly certain of the first and somewhat less of the last standard errors, and the two in the middle we're fairly uncertain of, in part because these are predictions and in part because there are only 33 districts, and in part because we're pairing years. But this is the best available method one could use, at least at the present time.

This is summarized at the bottom here, and you can see the Democratic plan is the point estimate slightly biased in favor of the Republicans, but it is not even as large as the standard error so one really can't make too much of it. The current plan is significantly biased in favor of the Republicans, as is the Republican plan skipping down to the fourth line. Both are considerably larger than their standard errors.

The Tilling plan, which is the one at issue [39] here, the point estimate is that it's biased in favor of the Republicans but it is not statistically distinguishable from zero. What appeared to happen here is that the Tilling plan took the current districts and moved them so that they were—there was less bias in favor of the Republicans.

So just to compare what happened in Exhibit 90 about the Ohio State House to Exhibit 91 in the Ohio State Senate, the Tilling plan took considerable Democratic

bias in the Ohio State House and turned it in to just about exactly fairness and took considerable bias in favor of the Republican Party in the Ohio State Senate and turned it at least into a lot less Republican bias. And since I can't distinguish, statistically distinguish it from zero, we might call that at least nonascertainable zero bias. So I would conclude that this is a fair plan.

Q. Do you conclude whether or not this plan is a partisan gerrymander, Tilling plan?

A. It certainly is not a partisan gerrymander.

Q. Did you receive data on which you could make a determination on whether there was racial bloc voting in the State of Ohio?

A. Yes.

Q. What is racial bloc or racial polarized voting?

[40] A. It is what happens at the end at the individual level, voter level, if black voters vote for certain candidates more frequently than white voters do. And we would call that racially polarized voting.

Q. Did you do bivariant ecological regression analysis to determine whether there was racial bloc polarized voting in the State of Ohio?

A. Yes, I did do an ecological regression analysis.

Q. At this time I would like to show you a document marked Defendant's Exhibit 92 and hand Mr. Gilliam a copy.

(Exhibit marked for identification.)

Q. Have you seen this document before?

A. Yes.

Q. Could you please describe for us what this document is?

A. There is a key on the first few pages here which describe some of the—some of the many, many elections and districts and years we used to analyze these data. If you turn to the fourth page of the exhibit—excuse me, the fifth page of this exhibit—you can see the results.

The district, the first two columns are codes which are explained in the key in the beginning of the exhibit.

[41] The third column is what is central here, and that is the proportion of blacks who vote for Democrats minus the proportion of whites who vote for Democrats. If this is a positive number then there is some degree of racially polarized voting.

As you can see down the line here, every one of these numbers is a positive number. Some are—there are a couple of them that are fairly small, but overall they are fairly large.

There is a standard error presented in each case for these ecological regression co-efficients and you can see in most of the cases, the vast majority of the cases, the coefficient that we're interested in is considerably larger than the standard error.

Finally, if you flip to the last page of this exhibit, right at the bottom it presents an average over all these years and districts and races, and first it's just the average of that statistic that I was talking about, the average of the percent of blacks voting for the Democrat versus the average of percent, minus the proportion—this is the average of the proportion of blacks voting for Democrats minus the proportion of whites voting for Democrats. And that is about 44 percent, .441 is the statistic here.

So that means that blacks vote for Democrats [42] much more frequently than whites. The standard error is only two-tenths of a percentage point and so it's considerably smaller than the statistic, which means we can be extremely confident that there is racially polarized voting in Ohio.

Q. And this is a "retrogression analysis"?

A. Regression analysis.

Q. At this time I would like to show you a document marked Defendant's Exhibit 93.

(Exhibit marked for identification.)

Q. Have you seen this document before?

A. Yes.

Q. Could you describe what is contained in this document?

A. This is, at the beginning here is a list of the same, essentially the same key as appears in the previous exhibit, which describes the district and the race we use. This is another analysis of racial bloc—racially polarized voting.

If we turn to basically any one of these figures, since they are all—each one of these is based upon a different district, but the conclusions from I believe every single one are almost identical. The proportion of—what is plotted here in each of these figures is the proportion of the Democratic [43] average district vote. Each of the little circles in this graph is a precinct within one district. So we could flip at random to—why don't we just to make it clear take the last one—let's just take the last, the last figure here. This label, I believe it is 93-69, just as an example.

This is the code at the top, which is explained in the key. It is the State Senate race for District 9 in 1990, and the variable I am considering here for the Democratic vote proportion is for the State House. The proportion black goes across the horizontal axis.

Now, why did I do this? Well, the two methods that have been used in the past to study or in the past in court testimony in any event to study racially polarized voting are bivariant ecological regression analysis and extreme case analysis. There are other methods which I am going to describe in just a minute, but both of these methods can be seen very clearly, much more clearly in these figures than in any other format.

For example, the extreme case analysis, if you look at the proportion black, when the proportion black is all the way, very close to one or very close to zero, you can determine how individual voters, individual black voters are voting, even though we don't get to follow them into the voting booth and look over their [44] shoulder. And you can see from this figure that when the proportion in

a precinct of the people who are black—excuse me. Let me say that again.

We can see when the proportion of people in the precinct is, approaches a hundred percent blacks, then the proportion voting for the Democrats is very high. And this particular figure is 95 or 100 percent.

When the proportion or when the district is composed almost solely of white voters so that the proportion black is about zero on the left-hand side of this curve, then the Democratic vote proportion is about 55 or 60 percent. So there is very clear racial bloc voting from that extreme case analysis which you can see here.

You can also make sort of a not quite extreme case analysis by looking a little in from one or zero. Moreover, bivariant ecological regression analysis sounds like a big fancy term but really what it is is a line fit to these points. And the steeper the line, the more racially polarized voting there is. And you can see that this line, if one plotted a line to these points, the line would not be flat, the line would be steep, and therefore there is racially polarized voting.

Shall I explain one other thing I did?

Q. Yes, please do.

[45] A. These methods, first two methods, bivariant ecological regression analysis and extreme case analysis, go back to the 1950s. Social science has gotten more sophisticated since then, and there have been a variety of models proposed to study the general problem of ecological inference. Just to repeat, the general problem of ecological inference is when we only have aggregate data but we really wish to know individual data. We can't look over people's shoulders when they vote, and so absolutely determining racial bloc voting is impossible but estimating it in a scientific way is possible.

Q. So there have been methods since then. I don't have—there isn't an exhibit to the following, but another thing that I did is use what is called an aggregated compound multinomia model, recent method, I think the most

recent method proposed in the academic literature, and I have also written about it. And the conclusions are virtually the same as what I presented here.

Q. And those conclusions are?

A. That there is racially polarized voting to a significant degree in Ohio.

Q. Thank you. Have any of your analyses indicated to you that the Tilling plan, the plan adopted by the [46] Ohio Apportionment Board, dilutes black voting rights?

A. No.

* * * *

[51] Q. Can you reasonably conclude—well, first of all, is it a fact that blacks predominantly vote for Democratic candidates in the general election for House races in the State of Ohio?

A. Generally, yes.

Q. Can you reasonably conclude from the fact that blacks vote for Democratic candidates in the general election for House races in Ohio that these particular Democratic candidates are the preferred candidate of the black community?

A. Well, presumably they are preferred to the Republican candidate, but that doesn't mean that they are the preferred candidate to the black community.

Q. Why not?

* * * *

[52] A. Certainly this indicates that blacks prefer the Democratic candidate offered to them over the Republican candidate offered to them. But that doesn't mean that they prefer the Democratic candidate in an absolute sense.

Q. Why is that?

A. Well, because there is a primary election and they might have preferred some other candidate in the primary. Moreover, the candidates that they would prefer in general might not have even run for primary election.

* * * *

[53] Q. Is it a racial gerrymander or can you reasonably deduce there is a vote dilution of the black minority voting power simply because a particular apportionment plan might elect fewer white Democrats than an alternative plan?

MR. GILLIAM: Same objection.

A. No. I mean blacks support the Democratic Party over the Republican Party. That is clear. They support Democratic candidates over Republican candidates. That appears to be clear.

But does that mean that they would prefer in general Democratic candidates being—that the [54] Democratic candidates offered to them are the ones they prefer in general? No.

If you mean do these, do blacks prefer white Democrats to black Democrats, there is no evidence of that at all. The argument that blacks prefer or could do as well with white Democrats as black Democrats strikes me as the arguments people used to keep blacks in slavery, it was safe for them, it was good for them.

Moreover, there are theories of representation in the academic literature, one of which for example is descriptive representation, which even beyond political representation, it is important that people have role models in government office, according to this theory anyway. And so that would be another reason why that line of arguament would not make sense.

* * * *

[68] Q. Did you make an evaluation of 1990 elections—may I finish my question, please?

Did you make an evaluation of what the white crossover vote was in 1990 for the eleven minority representatives in the House of Representatives?

A. No.

Q. Why not?

A. Well, let me retract that answer. I believe in—let me see if it's here. 1990 in the State House of Representatives—yes.

* * * *

[69] Q. All right. Now looking at District 14, can you tell me what the white cross-over vote was in District 14?

A. From this figure, no. Since what I have is—we wanted to know whether—for the purposes of this figure I wanted to figure out the proportion of blacks voting for Democrats minus the proportion of whites voting for Democrats. And that is the percentage presented here.

* * * *

A. I could have presented—can I continue?

Q. You may.

A. I could have presented these figures separately. It just seems there is an awful lot of information here and I wanted to present it in a concise way. One can see very clearly the proportion of whites voting for Democrats is less than the proportion of blacks voting for Democrats in every single district I [70] analyzed.

Q. But you did not analyze the proportion of white cross-over vote for black candidate; is that a true statement?

A. The proportion of whites voting for black Democrats, you mean?

Q. Yes.

A. No, in fact that is actually part of this analysis which I didn't present, which I didn't present in the way that you are asking the question, but I presented it I think in a useful way.

Q. Well, how would one know from looking at what you have marked here what the proportions of whites were voting for the black incumbent in District 14?

A. All one would know is that it's less than the proportion of blacks voting for Democrats.

Q. That's all you know; isn't that right?

A. And it's considerably less. In District 14 the difference between proportion of blacks voting for Democrats in each of these races is 50 percent, 37 percent, 39 percent, 32 percent, 26 percent, 48 percent, 40 percent.

Q. And that's how you measured racial bloc voting. This document is the basis upon which you measured racial bloc voting in the State of Ohio, right?

[71] A. That is one of three analyses.

Q. Exhibit 92.

A. It is one of three ways that I studied racial quote, polarized voting.

I did look at those proportions you are asking me about. Since that was not the question that's not what I presented here.

Q. Since that was not the question?

A. That wasn't the question that I was analyzing. I wanted to know exactly this difference.

Q. Who gave you the question to analyze?

A. Counsel asked for racially polarized voting and this is what I took it to mean precisely. Blacks are voting for Democrats more than whites are voting for Democrats. So blacks prefer different candidates than whites do. It happens in every case here.

If there was ever a pattern in social science literature this is it. This is the clearest pattern one would ever find in electoral data.

* * * *

[76] Blacks vote more Democratic than they vote Republican; we're clear on that?

A. Right.

Q. By a very substantial margin, true?

A. Right.

* * * *

[95] Q. Would it be possible to design a plan that perfectly allocated to each political party its share of

seats in a legislature but which also in fact diluted minority voting strength?

A. What do you mean by perfectly allocating seats in the legislature? You mean fairly according to my terms?

Q. According to your terms.

A. Okay. So since I am not studying racial—since partisan bias doesn't include racial calculations it depends how the districts are set up. It depends where the minorities live. It is certainly conceivable.

• • • •

[97] Q. And it's your impression then that Mr. Tilling lowered the black population percentages in the districts in all of the cities in Ohio where they were concentrated; is that right?

MR. BRADEN: That's a mischaracterization of his answer. Why don't you reformulate the question so it doesn't mischaracterize his last answer.

Q. What is your impression where he lowered the black percentages, in what cities?

A. I said I don't know where. I said I didn't see that information.

Q. And you didn't see the information as to where he increased the black percentages either then; is that correct?

A. Not where, but only overall.

Q. Only overall?

A. Right.

[98] Q. You didn't look at it on an intensely local basis, did you?

A. No, I didn't.

Q. You didn't for example examine Franklin County?

A. The only detailed local analysis that I was part of was watching—I did not perform myself—just watching the presentation by Mr. Tilling.

Q. All right. Then you do not know what he did with respect to black populations in any county in Ohio, correct, any urban county?

A. That's not what I said. I said I saw—I saw some totals for the state and not attached to particular locations. So you can't ask me—it is not reasonable to say I don't know it in any particular area since—period.

Q. What was—what did the plan do in Cuyahoga County with respect to minorities?

A. I don't know the details.

Q. What did it do in Franklin County with respect to minorities?

* * * *

[99] Q. What does the plan do in Franklin County?

A. I did not study it.

Q. Hamilton County?

A. I was not asked to and didn't study it.

Q. Lucas County?

A. Same.

Q. Summit County?

A. Same.

Q. Montgomery County?

A. Same.

* * * *

[Exhibit 8 to Deposition of William W. Pfeiffer
(December 11, 1991)]
[Docket #105]

PAIRED MEMBER'S WARD AND OR PRECINCT

49th	CASEY JONES	TOLEDO WARD 8, PRECINCT H
	DON CZARCINSKI	TOLEDO WARD 4, PRECINCT F
61st	JOSEPH KOZIURA	LORAIN WARD 4, PRECINCT C
	KATHERINE WALSH	OBERLIN CITY WARD 4, PRECINCT A
48th	THOMAS SEESE	COVENTRY TWP. PRECINCT N
	CLIFF SKEEN	SPRINGFIELD TWP. B
11th	JANE CAMPBELL	CLEVELAD WARD 4, PRECINCT G
	JUDY SHEERER	SHAKER HEIGHTS N
	SUZANNE BERGANSKY	BEDFORD HEIGHTS WARD 4, PRECINCT C
65th	RON GERBERRY	AUSTINTOWN PRECINCT 5
	JOE VUKOVICH	POLAND TWP. WARD 7, PRECINCT 16
98th	JERRY KRUPINSKI	STEUBENVILLE WARD 5, PRECINCT D
	GREG DIDONATO	DENNISON PRECINCT 1

78th	MARC GUTHRIE	LICKING TWP. NORTH PRECINCT
	PAUL MECHLING	HOPEWELL WEST PRECINCT
	MARY ABEL	ATHENS WARD, 4, PRECINCT 2
23rd	MICHAEL STINZIANO	COLUMBUS WARD 40, PRECINCT G
	RICHARD CORDRAY	JACKSON TWP., PRECINCT B
92nd	VERN RIFFE	PORTER TWP., PRECINCT J
	MARK MALONE	SOUTH POINT 2, PERRY TWP.

DEPOSITION OF GOVERNOR GEORGE V. VOINOVICH
(December 16, 1991)
[Docket #128]

[8] Q. All right. My question, what I'm trying to get at is whether or not you had any personal understanding of what the Constitution, either Federal or State [9] Constitution requires with respect to the reapportionment of Ohio House and Senate districts?

MR. DELEONE: Show an objection to the question.

A. I know that it has—should I answer?

MR. DELEONE: Sure, go ahead.

A. I know that it has to be Constitutional, Ohio Constitution, Federal Constitution, I think the Voting Rights Act, but in terms of the details of what is required and all the rest of that I don't know.

Q. All right. I take it that you relied on Mr. Tilling to assure that the plan as drawn by the 1991 board comported with Constitutional and other requirements, is that right?

A. Yes, I relied upon him.

* * * *

[12] Q. All right. Did you have any discussions with Mr. Tilling prior to the adoption of the plan about the plan or the legal requirements of the plan?

A. I don't think we ever talked about—I mean, I generally knew what, as I've already testified to, the Constitution of Ohio and the Voting Rights Act, but fundamentally he showed me the plan and said, "This is within the framework of the Constitution," and I relied on it.

[13] Q. When did he first show you that plan?

A. I don't remember.

Q. Was it shortly before the September 30, 1991, Apportionment Board meeting, do you recall?

A. You know, I may have seen that plan the first time at the meeting.

Q. At the Apportionment Board meeting?

A. Yeah. I think—didn't we get a map of the thing and then there was a problem with wards and precincts or something and they—

• • • •

[26] Q. Do you know whether anyone has done a comparison of the 1981 lines and the 1991 lines to determine that they were maintained to the extent possible?

MR. DELEONE: Object. Well, object but if you know, answer.

A. I don't know.

• • • •

[27] Q. Governor, what is your understanding of the term majority minoirty districts?

A. My understanding is that we had to guarantee that minorities in the state were properly represented in compliance with the amendments of the Civil Rights Act.

MR. DELEONE: Voting Rights Act.

A. Voting Rights Act.

Q. Have you ever read the amendment to the Voting Rights Act or someone reported to you their substance?

A. I've never read it.

Q. Did you receive any advice of counsel with respect to the legal requirements for the plan, and I'm not asking, Governor, that you disclose such advice to me, merely whether you received it?

[28] Advice from legal counsel?

Q. Yes.

MR. DELEONE: Does that include Mr. Tunnell? Are you including him who is a member of Mr. Voinovich's staff?

A. I'm not sure we have talked about this.

MR. DELEONE: Okay.

A. I don't know if I did or not. All I know is that there was a concensus that what we were doing was in accord with the Constitution and it was proper.

Q. Okay.

A. That basically was it.

Q. And that consensus, I take it, came from—strike that.

The consensus was among you, Mr. Aronoff, Secretary of State Taft, and Mr. Tilling, is that correct?

A. I think the understanding was more with Mr. Tilling that he represented that what had been put together was proper.

Q. So you relied on Mr. Tilling to comply with the Board's directives regarding the plan?

A. Yeah, and I assumed also that if he had—if he had legal counsel they consulted with him but I more or less looked to him.

[29] Q. You personally did not have any consultations with counsel that you recall regarding the plan?

A. I can't remember any conversation.

Q. Are you aware of any analysis that was conducted regarding racial bloc voting?

A. No, I'm not.

* * * *

TRIAL TRANSCRIPT (December 17, 1991)
[Docket #130]

KING—DIRECT

[161] Q. Have you had an occasion to review the 1991 apportionment plan as adopted by the apportioning board?

A. Yes.

Q. Have you also had an occasion to review the plan as repaired by the minority, the Democrats in this area?

A. Yes.

Q. Have you also had an occasion to review the plan as reviewed by the Ohio Republicans?

A. Yes.

Q. Did you undertake an analysis of the partisan bias with regard to each of those plans?

A. Yes.

Q. And what is partisan bias?

A. Partisan bias—would you like to turn to—

Q. Sure.

A. Eighty-nine.

Q. Exhibit 89?

A. If you like, partisan bias is an asymmetry in the treatment of electors from political parties by the electoral system. If one party can receive more votes for the same proportion of votes than the other party could receive if it received the same proportion of votes, then that's bias.

Q. And have you had occasion to perform what's known as a seat vote curve?

A. Yes.

[162] Q. —analysis.

A. Yes.

Q. And what was your basic methodology in the seat vote curve analysis?

A. It's based upon a multiple regression analysis, well accepted technique that's been used for well over 100 years as the most common statistical technique used in the social sciences.

Q. I will direct your attention to Defendant's Exhibit 86 for a moment. What is that; what does that exhibit show?

A. This shows the translation of the average district vote proportion across districts into the average proportion of seats for the two parties.

So, for example, in this hypothetical curve the wavy line there indicates that if the Democrats on average across districts receive approximately 50 percent of the votes, then if you go up to the wavy line and over to the left, you can see that the seat proportions for the Democrats is somewhat above 50 percent.

In fact, it's about 54 percent. That means if the parties in this hypothetical curve were to split the votes equally, which they don't, but if they were to, then the Democrats would receive approximately four percent more votes than the Republicans, and the Republicans would receive approximately four percent of the seats less.

[163] Q. All right, and has the seats vote curve analysis been accepted as a matter of political science?

A. Yes.

Q. And over what period of time?

A. It goes back to, I believe, just before the turn of the century.

Q. Now, what is the issue of partisan swing as a matter of political science and statistics?

A. Partisan swing is as exemplified in the exhibit that you're referring to indicates how one, how the votes in one year translates into the votes in the next year. One can see from Mr. "X" for example that this exhibit portrays the district, individual districts.

Each district is a circle, and so you can see that when the Democrats receive a higher proportion in 1989, they get a higher proportion in 1990, not exactly, but roughly.

* * * *

[164] Q. I would also indicate for the record that Dr. King was deposed on Friday of last week. His ex-

hibits were marked, provided to counsel for their review at that time, and he was cross-examined by the plaintiffs. Dr. King, I think we're on Exhibit 88. Would you describe that?

A. Yes. This is a summary of partisan bias for each of the years from 1968 to 1990. This is actually an update of something that I published previously before I was involved in this case. If the horizontal line that goes across at zero partisan bias indicates fairness between the two political parties.

If the line, if the staggered line is above that zero mark, then the bias is in favor of the Democratic party. And if it is below the zero mark, the bias is in favor of the Republican party. So, the partisan bias was estimated at each of the election years and the points were connected for visual clarity.

In '68 and '70 you can see the electoral system in the Ohio State House was considerably biased in favor of the Republican party. After the 1970 redistricting the system became biased in favor of the Democratic party and remains biased in favor of the Democratic party until 1990.

Q. Does this Exhibit 88 reflect the partisan bias inherent in the 1971 apportionment plan and the 1981 apportionment plan?

[165] A. It shows that the 1971 apportionment plan is, had quote an enormous effect on the Ohio State House electoral system. In fact, it's the largest effect that's ever been noted in the academic literature. For the 1981 plan the effect of the plan on the system was not. But it kept the same level of Democratic bias.

Q. And then turning to Exhibit 89, would you, does that chart indicate the same analysis for the Ohio State Senate?

A. Yes.

Q. Now, I want to talk about Exhibit 90. Can you see this, Dr. King?

A. Yes.

Q. First of all, does Exhibit 90 address the Ohio State House?

A. Yes.

Q. All right, and we have on the vertical axis partisan bias?

A. Yes.

Q. And again would you briefly explain what that is?

A. This is the same square as on the previous page that we just discussed. When partisan bias is above the line, that's bias in favor of the Democrats. When it's below the line, that's bias in favor of the Republicans.

A. Perhaps I can explain in slightly more detail. Let's look at the number point 04 for example.

[166] That means that the Democrats are receiving four percent more votes than they should under a fairness standard, and the Republicans are also receiving four percent fewer votes than they should under the fairness standard.

Q. And the horizontal axis is a time analysis by year?

A. Is the election year.

Q. Okay. I want to talk for a moment about proportional representation. Would you explain proportional representation?

A. Proportional representation is when if a party receives 52 percent of the votes it receives automatically 52 percent of the seats. That's the law in many countries. It's not the law in the United States.

Q. Okay. And does your, does the seats vote curve assume proportional representation?

A. No. From the seats votes curve one can assess the electoral system in any way one desires. One could compare it to a proportionality standard, but I'm not a lawyer. But as I understand, the Supreme Court proportionality is not the relevant standard here.

The one that I was referring to is symmetry, treating the parties equally.

Q. And what is symmetry?

A. Well, for example, if one party receives 52 percent of the votes on an average statewide and they're able to [167] extrapolate that into 70 percent of the seats for example, then that's fair only if the other party, when it receives 52 percent of the votes is also able to translate that into 70 percent of the seats.

So, that's not a proportional translation, but it does treat the parties equally. That's called partisan symmetry or no bias in this partisan bias sense.

Q. Is it possible, Dr. King, with the tools you have available as a political scientist and a quantitative analyst and within a reasonable degree of statistical certainty to determine the partisan bias in any particular apportionment plan?

A. Yes.

Q. And with regard to Exhibit 90, then, returning to that, would you indicate first of all the line marked "current" up here with the "C", what that line is, and what it represents?

A. That's an analysis based upon the current districts for just the years 1984 to 1990. That line, if you will look back a few exhibits, is the same line for those years as was on the previous exhibit for the Ohio State House. It's just for comparison here.

Q. Does that indicate the results under the current 1981 apportionment plan?

A. Yes.

Q. Not the 1991, but the 1981?

[168] A. Yes, in the districts as they currently exist.

Q. Now, would you explain the relation to the line of partisan bias?

A. Well it indicates that there has been partisan bias in favor of the Democratic party for all four years.

Q. And what indicates that?

A. The fact that the current line, the line on that curve is always above the zero level of fairness.

Q. And that analysis is based on the vote curve analysis?

A. Yes.

Q. In is that a regression-type of analysis?

A. Yes.

Q. Now, the line that's marked "D" for Democrat is right here. What does that indicate to you?

A. Well, what that is is predictions also based upon regression analysis of what would have happened in 1984 to 1990 if the current plan, excuse me, if the 1991 Tilling plan—

Q. The Tilling plan?

A. Excuse me, if the 1991 plan proposed but not implemented by the Democratic party were put into effect in the year '84 through '90, if that were true, then that line, the dashed line at the top indicates that the bias would also be in favor of the Democratic party.

The precise configuration over the years differs [169] somewhat from the current districts, but that line is always above the zero level of partisan bias.

Q. What's the significance of the fact that the line is always above zero partisan bias?

A. It indicates that that plan is biased in favor of the Democratic party.

Q. And again that's the 1991 Democratic plan?

A. Yes.

Q. All right, what about "R" the Republican line?

A. That line is almost always below the zero line and therefore indicates Republican bias throughout the years '84 through '90 if the Republican plan were put into effect.

Q. Now, with regard to "T", Tilling, is that the plan drafted by Mr. Tilling and the plan as adopted by the persons responsible for apportionment in 1991?

A. Yes.

Q. Can you explain that line then?

A. Well, it shows that on average that lane is roughly zero. Sometimes it's below and sometimes it's above. So,

for some of those hypothetical elections, bias in favor of one party, and for some of the elections bias is in favor of the other party. On average you can see it is just about zero.

Q. Would you explain the significance if any between the lines for the Tilling plan the plan adopted by the board in [170] relation to zero partisan bias?

A. Well, zero partisan bias is fairness. Since the Tilling plan, since the line for the Tilling plan varies fairly closely around that line, it indicates that the Tilling plan is a fair plan according to the partisan bias standard.

Q. Would you explain the relationship of the line represented by the Tilling plan to the Republican, to the current plan and to the Democratic plan?

A. It provides another observation that in fact the Tilling plan is fair. Since we can reasonably expect in the Democratic plan to be biased in favor of the Democrats, the Republican plan to be biased in favor of the Republicans, that is in fact what that analysis shows. The Tilling plan lands right in the middle, so it really looks like a fair plan.

Q. Now, what is the concept of standard errors in a regression analysis such as the seats vote curve analysis?

A. Well, the public would be familiar with standard errors. For example, in the media journalists reported a margin of error or standard error is another way to express one's uncertainty in one's results.

Q. Now, in the block below, starting with the Democratic plan which is a plan consistently above the line for zero bias, what does the average partisan bias indicate? [171] A. That is the average over those four years. So, that what the table at the bottom of this exhibit is doing is summarizing in clear form all of the lines at the top. And so, shall I go through them?

Q. Yes.

A. One can see for example that the Democratic plan is on average across those four years biased in favor of the Democratic party by 2.6 percent, which means that

if the Democratic plan were in effect from 1984 to 1990, then the Democrats would receive 2.6 percent more seats than they should under this symmetry standard, a standard which dates back at least 40 or 50 years in the academic literature.

And the Republicans would receive 2.6 percent fewer seats than they should under this fairness standard. Current districts are simply biased in the same direction, although slightly more than the Democratic plan?

Both of those figures are considerably larger than their standard errors. Now, in both social science analysis and also in Supreme Court decisions everyone recognizes that a statistic should only be presented with a standard error. And if it's not, one can't really evaluate how well one knows that number.

The Supreme Court has said explicitly if the statistics are two or three standard deviations difference from zero, then we can reasonably conclude that it is different from [172] zero. And you can see that the Democratic plan and the current plan are two or three standard deviations above zero.

Q. We're talking here about standard deviation?

A. It's referred to by both terms.

Q. And how is that term, what is that term? What does it mean in conjunction with that graph?

A. It indicates how well we know each of the estimates we provide.

Q. Now, what, the standard error in the calculation, I think, you show as point zero one zero?

A. Yes.

Q. What does that indicate with reference to the average partisan bias of the Democratic plan?

A. That means roughly when you look at number 2.6 percent, point 026 which I'm translating to 2.6 percent bias in favor of the Democratic party, then we sort of know that number to roughly plus or minus one percent. It's plus or minus one standard error.

Q. And the relation of the partisan bias index or the number for the Democratic plan in relation to the standard of error, what does that tell you about the partisan bias of the Democratic plan?

A. It tells you that we conclude that there is statistically and substantial, significant bias in the current plan, and the Democratic plan.

[173] Q. That's the 1981 apportionment?

A. Yes.

Q. Would you explain the average partisan bias of the current 1981 apportionment in relationship to the standard error?

A. According to this partisan symmetry standard, the Republicans are receiving approximately 3.3 percent of the seats, more than they should under this, under treating the parties equally standard.

Q. You said the Republicans.

A. Excuse me, the Democrats are receiving approximately 3.3 percent of the seats more than they should, and the Republicans are receiving 3.3 percent seats fewer.

Q. And what is the average partisan bias index for the current 1981 apportionment plan in conjunction with the standard error and in relationship to the location of the line above partisan bias, zero?

A. We can see that number is many times the size of the standard error, and therefore one can conclude statistically and substantially indicates bias in favor of the Democratic party.

Q. Dr. King, with regard then to the Republican plan that is the plan proposed but not accepted by the Ohio Republican Party, would you explain the average partisan index and the standard in conjunction with the line below the partisan [174] line?

A. The average bias for the Republican plan looks like a mirror image for the average partisan bias for the Democratic plan. The figure there indicates that if the Republican plan were put into effect, the Republicans would receive approximately two percent more of the

seats than they should under a fairness standard, and the Democrats would receive approximately two percent of the seats fewer.

Q. And finally and most importantly the Tilling plan or the plan adopted by the 1990 persons responsible for apportionment, would you explain the average partisan bias index and the standard errors in relationship to the location of the line for that plan?

A. The average partisan bias estimate made there is minus point 006, which is six tenths of one percent bias in favor of the Republicans. However, this is not even as large as the standard error, much less to two or three times as large.

And therefore as according to the Court and standards that number is not statistically different from zero bias, and therefore I would conclude that it's a fair plan.

Q. In summary then, do you have an opinion as to the fairness of the plan adopted by the 1991 apportioning people with regard to the partisan bias of that plan or the fairness of the plan as adopted?

A. To the Tilling plan?

[175] Q. Yes.

A. Yes, the Tilling plan, I believe, is a fair plan by this standard, yes.

Q. And do you reach that conclusion based on a reasonable degree of certainty in the area of statistics and political science?

A. By reasonable degree of certainty that is actually present there, yes.

Q. Now, did you do a similar analysis for the Ohio State Senate?

A. Yes.

Q. And what generally were your conclusions regarding the Senate?

A. Well, the electoral system in the Senate for the last two decades or so has actually been biased in favor of the Republican Party, but if you will look at where votes are wanted, the Republicans are wasting many

fewer votes than the Democrats are, so before the 1991 plan the Senate system was biased in favor of the Republicans.

You can see that by the previous exhibit. My analysis of the senate plan by Tilling and by the current districts and the Democratic districts is a mirror image of the House plan. Current districts are biased in favor of the Republicans. The Democratic districts are the most or actually the least biased in favor of the Republicans. [176] They're the highest on that curve.

The Tilling plan is next. And the Democratic, I'm sorry; excuse me—then the Republican plan is most biased in favor of the Republicans.

Q. And are you able to make any conclusion regarding the Tilling plan, the plan adopted with respect to average partisan bias in relationship to zero, the line at zero, or symmetry?

A. One can't statistically distinguish that line from zero bias.

Q. Can or cannot?

A. One cannot statistically distinguish the Tilling plan from zero bias.

Q. What does that mean?

A. That means it is a fair plan so-far as we can tell on the basis of this analysis.

Q. I'd like to turn your attention to Defendant's Exhibit 92. Have you had occasion to conduct a bivariate ecological regression analysis with respect to the issue of racial bloc voting?

A. Many of them, yes.

Q. What is 92? Tell us the first few pages.

A. The first few pages are a key which indicates the list of the race, of some of the races which we analyzed. And perhaps we should—we can skip the details of which since [177] the findings are quite similar across all 200 races.

Q. Just take one example, say item 17, U.S. Senate. Just at random what is the district?

A. Item 17, we took all the precincts for the State House and examined the race for the United States Senate, broken down within that state house district, and performed a ecological regression and other analyses within that district.

Q. And the race itself, 86 "S", what does that indicate if anything?

A. That's the racial for the Senate. "S" stands for Senate.

Q. Next column "D" is the—

A. That's District 42.

Q. And 1986?

A. Is the year.

Q. And U.S. Senate?

A. That's the race we analyzed.

Q. How many different races in total did you analyze under the bivariate ecological regression analysis?

A. There are 210 presented here, but in fact I actually analyzed quite a lot more. I don't know the exact number.

Q. More than 210?

A. Yes.

Q. Okay. Now, I'd like to turn to Exhibit 93, titled [178] "Listing of Scatter Plots."

A. At the beginning here is another key which you see resembles very closely the previous key. Shall well turn to some of the scatter plots?

Q. Yes. Let's take one scatter plot and explain what that is, page 93-1 perhaps.

A. Well, this is the proportion black in the precinct is along the horizontal axis, and the Democratic proportion of the two parties' vote is along the vertical axis. So, the higher the vertical axis, the more the precinct voted for the Democrats, and the lower the more the precinct voted for the Republicans.

A. Each of the little circles on this graph is a precinct. In ecological regression all one district is fit a straight line to this set of points. The line is not plotted

here, but you can just by eying it, you can see where the line is. The steeper the line, the more the relationship between proportion black and Democratic votes.

And as you can see, as the proportion black is higher, those precincts have a much higher probability of voting for the Democrats in this particular set of precincts. There are no precincts where the proportion black in that precinct is above 75 percent, but even when you get up to about 60 percent, those precincts when the district is about 60 percent black, those districts are voting almost 100 percent [179] for the Democratic candidate.

Q. And what does that tell you if anything regarding racial bloc voting?

A. That it exists and is very, very clear if there ever was a pattern, it exists here.

Q. Does your analysis lead you to any conclusions with regard to races throughout the entire state?

A. That there exists racially polarized voting in a significant way in all of the elections that I've analyzed.

Q. Have you had an opportunity to review Mr. Henderson's analysis of racial bloc voting in Henderson Exhibit 2, which I will is at tab 4.

MR. ATKINS: That's tab four.

Q. Let me hand it to you; it's Henderson Exhibit 3.

A. Yes.

Q. Have you, first of all, did you observe any scatter point plotting with regard to that alleged regression analysis?

A. No.

Q. Did you observe any calculation of standard of error or standard deviation?

A. No.

Q. And what is the absence of a standard error or standard deviation in a bivariate regression analysis?

A. That means we don't have any idea how precise we should [180] take these numbers to be. For example, these figures purport to indicate the proportion of black voters who vote for the Democrats.

We can't ever know that for certain unless we can follow local blacks into voting booths and look over their shoulder and see how they vote. That's not legal in the United States. Those are estimates, but the question is how good an estimate is it.

If I said to you the weather tomorrow is 15 degrees point 216483, you'd say that's absurd. You don't know the weather that precisely, and since we don't have any idea at all of how precise these estimates are, I really don't know what to make of that.

Q. How many districts or how many races were analyzed in Henderson Exhibit 3?

A. Eleven.

Q. And how many did you analyze?

A. Over, well over 200.

Q. And in the absence of a standard of error on only looking at eleven districts, what if anything can that reasonably lead you to conclude about racial bloc voting?

A. Well, let me give you two answers. One answer is that one can pick, in almost any set of data, one can pick 11 points out of however many there are and find almost anything you like.

[181] That's why statisticians get the reputation for doctoring data because one can do that. So, we needed to know whether these districts are representative of all the other districts. So, from that perspective we don't have any way to evaluate it.

From another perspective, let's imagine for example that these numbers are fairly precise. We don't know that so just take that as an assumption. If we do, then there's racially polarized voting here, fairly clearly.

Q. And give us an example of what leads you to that conclusion.

A. Well, in District 12 which is the first district presented here, slightly less than 95 percent of blacks according to this estimate are voting for the Democrats, and 64 percent approximately voting for the—of whites

are voting for the Democrats, that's racially polarized voting.

Q. Have you had an occasion to review Mr. Henderson's calculation of and use of a voting index or political index?

A. Yes.

Q. Would you explain to the Court how that index was calculated?

A. Well, as I understood it, what the index did is takes statewide vote for the five statewide offices, break them down into legislative districts, and total up the number.

Votes for the Democrats in each district total up the [182] number of the votes total for the five statewide offices in the district and divide the first number by the second number to get a proportion of Democrats of the five statewide offices in each district.

Q. Do you have any comments or criticism concerning the use of such a voting index or political index in an attempt to determine political gerrymandering or not?

A. It assumes that if one breaks down statewide votes into districts, one can perfectly predict State House results. We know that can't be true. It's not true in any election precinct in the United States.

If it were true, then the State House and Senate would be represented by a majority of the same party. The Governor would always be of the same party as those two bodies. Moreover, all across the United States there's a tremendous increase in divided party control of Government.

Given that, one would be particularly interested in using a measure like this. The second point I have is that this measure is also not accompanied with any margin of error or degree of uncertainty or standard deviation analysis so it's hard to tell how precisely we should take the result, and there's good reason to be quite skeptical.

Q. Do you have any comments concerning the use of such a voting index with respect to any kind of analysis to a district-by-district?

[183] A. Do I—

Q. Do you have any comment or criticism concerning the use of a voting, such a voting index or political index with regard to the analysis of any particular district?

A. Yes. We know for example that if—that statewide elected officials come from different areas of the state and therefore will probably do better electronically in those areas of the state. So, the index is likely to be particularly biased in one way for some districts and biased in the other way for other districts.

* * * *

REDIRECT EXAMINATION

[192] BY MR. COLLIER:

Q. I want to turn back to your exhibit on the regression analysis on racial bloc voting. Would that be Exhibit 93?

A. One of the two exhibits on racial bloc voting, yes.

Q. Let's go again to races you have for the house. Would those include State House races throughout the State of Ohio?

A. For selected State House races. Since there wasn't much point in performing racially polarized voting analysis if there were no blacks in the district, for example.

Q. Now, you were asked questions about particular districts. Would you turn to page 93.1 just for an example?

A. Yes.

Q. What do those dots indicate?

A. Each dot is a precinct. The entire page refers to one district, District 45, House District 45. The precincts line up very clearly. The more blacks that live in the precinct the higher the Democrat proportion is, excuse me, the higher the Democrat vote is in that precinct.

The pattern is as clear as any pattern in the social sciences.

JUDGE DOWD: Let me inquire is there some way of determining a black precinct from a non-black precinct in this exhibit?

THE WITNESS: Yes, across we have the [193] proportion of the black voters in the precinct. So, it goes from zero percent to 100 percent, which the proportion goes from zero to one.

JUDGE DOWD: I see.

BY MR. COLLIER:

Q. On Exhibit 92 for a moment, if we pass the key which lists the 210 races, we get into the ecological regression analysis. Do you have that page?

A. Yes.

Q. What does that show under "Votes for Democrats BL-WH"?

MR. ATKINS: What page is that, counsel?

Q. It's the fourth page into exhibit 92.

A. That number is an estimate of the proportion of the blacks voting for the Democrats minus the proportion of the whites voting for the Democrats. Democrats, all those numbers are positive which indicates all my estimates vote—blacks voting for Democrats in higher proportion than whites voting for Democrats.

The numbers are sometimes quite large, sometimes small. Almost all of them are significantly larger than the standard error which is presented in the fourth column there.

Q. What does that indicate, the fact that the third column figures are higher than the standard error?

A. That indicates that we can conclude both substantively and statistically that there exists racially polarized voting [194] in all the districts analyzed here.

Q. Was there any exception to that?

A. There might be one or two in the two hundred. We can summarize them by looking all the way at the

end of the exhibit. For average results, it was just an average across all of the races analyzed in this exhibit. You can see that the difference in the proportion of the blacks voting for the Democrats minus the proportion of the whites voting for the Democrats is about 44.1 percent. So, that's an enormous difference.

Q. When you, and Mr. Gilliam asked you, I believe his final question about how you determined proportion of whites voting for black candidates, you indicated that could be done from your regression analysis.

A. Yes.

Q. How would you do that basically?

A. Well, one can't find it in this particular exhibit, except that we know from this particular exhibit that whites vote for Democrats less frequently.

One can find the results very easily from ecological regression analysis which I did perform. I had to summarize the results in some, which since there were so many of them and this is what I chose to present since it seemed to be the position at hand.

One can find the proportion of whites voting for [195] Democrats if we skim to the scatter plots, again an easy way to see it from the scatter plots, if you look at proportion black in the district around zero.

Look at all the precincts where the proportion of black is zero over on the left hand side. From the scatter plots you can pick the average of those is a good estimate of the proportion of the whites who voted Democratic.

So, in this first figure which is 93-1 the average of the precincts where the proportion of the blacks is approximately zero a little over 50 percent.

Q. Besides bivariate ecological regression analysis, did you use any other kind of regression analysis as a test?

A. Well, I used other statistical tests. One is the scatter plots. The scatter plots reflect both an ecological regression analysis and homogeneous precinct analysis, which is what I was just talking about.

We know exactly how blacks and whites vote if they're in homogeneous precincts and if they're in precincts which are black or white. In this district we have homogeneous whites, and some of the districts we have homogeneous black, precinct that is.

I also performed another statistical technique which is of more recent invention. The texts we talked about so far go back about 50 years. The other one for which I have not presented an exhibit but it's called an aggregated compound [196] model which has been written about the statistical literature by myself and others.

Q. This is a test?

A. Yes, another test for racially polarized voting, and it also indicated there were significant degrees of racially polarized voting.

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EXHIBT B TO NOTICE OF FILING RECORD
(Apportionment Board Transcript: February 11, 1992)
[Docket #147]

[45] DR. KING: Thank you.

Good evening, everyone. I was asked to address two questions. The first is, is there racial bloc voting in Ohio, and the short answer to that is yes. The second [46] is, how does one draw districts to protect the minority voting interests, and the short answer to that is, there's many factors that affect the election of minority candidates, and one should take into account as many of these as possible. They include, among other things, incumbency, racial bloc voting, racial configuration of a district, campaign funding, and several others. Finally, I will make a few closing remarks about political fairness.

I'm now going to present some evidence on these matters and make eight specific points in the process. The first is one I've already made essentially, and that is that there exists extensive racial bloc voting.

The first exhibit, which is Exhibit 108, we don't have transparencies. It's approximately 250 pages. It would take a little while to put up. However, we have an analogous figure that Mr. Collier has already shown. Perhaps we can put that up and we can take a look at it.

We've done an analysis, as we're about to see and as we've already seen briefly, in every district in which there was a majority black population and in numerous others throughout the state, and we've done this in each district for the House races and also for statewide races and national races and state senate races.

[47] Well, if the Board has—here we go. If I could just refer—this is an example of a district. The one that the audience is looking up at over here is not the same one that the Board is looking at in the exhibits, but they're analogous. And the results in racial bloc voting are so similar across the entire state that it almost doesn't matter which district you choose.

In any event, in the top right-hand corner of this figure are precincts, in whichever district you're looking at, the 45th one up there or 21st in your books, even very high proportions of the black voting age population. The farther to the right the little dot or circle appears, the higher the proportion of blacks in the population. The higher a dot appears, that is on the vertical axis, the larger the vote for the Democratic candidate.

As you can see, for the largely black precincts, they vote overwhelmingly for Democratic candidates. As you can also see on the left-hand side of the graph, when the proportion of black is very low or even close to zero, the support for the Democratic candidate drops quite a bit. So this is a standard example of racial bloc voting.

If you focus on only the districts at the extremes, that's called a homogenous precinct analysis. [48] If you focus on the slope of the line one would fit to those points, that's called an ecological regression analysis. And there are other statistical procedures we've used to analyze the data, as you can see on the form there.

If you like, we could go through some of the 250 other graphs here, but I think perhaps we should go on to Exhibit 109 since the results are quite—are remarkably similar across all of these.

Exhibit 109 summarizes some of the results in a slightly different format than we've shown before either here or in court. It summarizes the results in this ecological regression analysis for districts in which there is a majority black population.

In the column labeled whites, that's the proportion—these are estimates, but there's—one can't go into a voting booth and follow people in and actually tell how whites and blacks are voting. We don't really know these things. That's why we have to use statistical procedures.

The column labeled whites is an estimate of the proportion of whites who vote for the black Democratic incumbent in State House races averaged over all the incumbents. And as you can see, in 1984, that's 56.76

percent. In the same year, the average over the same [49] districts, the proportion of support for the black incumbent candidates among black citizens is about 95 percent. The difference between those figures is racial bloc voting. That's obviously—I mean, it goes without saying, this is important political information for anybody running for office.

The same thing is true in 1984 as is roughly true in 1986, 1988, 1990. These are averages, and as I said, similar facts apply to detailed analysis of almost every specific district in the state.

The second point is that, as you can see from this figure, there is crossover voting of whites for black candidates. That's what's called crossover voting.

Indeed, in these districts, it appears that a majority of whites have supported the black incumbent candidate, so the crossover voting is large in a sense. Nevertheless, would one conclude from that that if you have a very small proportion of blacks in the district, that that district could elect a black candidate? Well, it could, but it's extremely unlikely to do so. The reason why is because you would not see crossover voting if the whites could elect a candidate that was not black. We would make that inference from the large amounts of racial bloc voting in the state.

Is there a question?

[50] Well, if we could turn to the next exhibit, which is 110. This is a different version of some of the data that Mr. Collier has shown you. In the first set of columns on the left-hand side, we have ranked from most to least in terms of the proportion of the black population in the district, and you can see—and on the left-hand side, we have the current districts, and that is the districts on the 1981 apportionment plan. This is to get a basic sense of what the '81 apportionment plan was about with respect to minority communities, and then I'll compare that to the 1991 plan on the right-hand side.

So with respect to the left-hand side, that is the current 1981 districts, you can see that there are three dis-

tricts right at top of very high proportions of the black population. This is clear evidence, one would conclude, of packing, which is something that is not in favor of the minority community. In addition, there are—there's only one district which has a proportionate black population, between 50 percent and 74.8 percent, so in that area, where you want to have most of your districts, in any event, there's only one district on that point.

If we look over on the right-hand side, we now have a ranking of the districts under the proposed plan [51] also according to the black population. The first thing you can see at the top is that the packing has gone away. No longer are there 90 percent districts in terms of black population. There aren't even 70 percent districts.

The second thing you might notice is that the underlined entries in each column are entries greater than 50 percent, and so you can see that in the Tilling plan, the majority Apportionment Board plan, there are twice as many majority-minority districts as under the current plan.

One thing that plaintiffs in this case have made a point of is that there are fewer districts under the Tilling plan which have greater than ten percent of the minority population, and that's true, because look at these two districts—look at these two columns. The ten percent goes all the way down to number 27 on the left-hand side and goes down to about number roughly the 20th district on the right-hand side. So what's this about? What happened was Mr. Tilling and his associates who drew the plan took fragmented minority votes spread throughout the state and joined them together in order to empower them electorally. That's the basic idea of following the Voting Rights Act, and that's—if you just look at this, this is a good summary of what [52] happened to the black eommunity under these two plans.

The next thing I'm going to show is an Exhibit 111. This is preparatory to a few exhibits that will follow this

one. In the exhibits that follow this one, I'm going to use a statistical model called regression analysis to make some predictions. And what I wanted to show you first was that the predictions work. So what I did in Exhibit 111 was to calculate the predictions for elections and then compare the predictions to the actual results. If you look, for example, in the top left-hand corner, District 12, the actual election results in District 12 was 88.54 percent for the Democrats, and my prediction was extremely close to that, obviously. Some of the districts are—some of the districts as good as that; some are a little worse; some are a little better. But overall, as you can see, the predicted result works out roughly as expected.

Let's go on to the next exhibit, please.

In Exhibit 112, we use some of the—I'm using some of the predictions which I'm repeating from the previous page, and I'm going to compare them from predictions under the 1981 plan to predictions under the 1991 what I'm calling the Tilling plan.

In District 12, in the current plan, that is the '91 plan, that corresponds sort of roughly to District 10. [53] under the Tilling plan. I say roughly because if they correspond exactly, then there wouldn't have been any redistricting, obviously. But the incumbent member of the House is now in District 10 and was previously in District 12, the same person.

If we look down the first column there for predictions in 1984 under the current plan, the 1981 plan, we can look down those proportions, and those are predicted proportioned Democratic in each of the black incumbent legislator's districts, so obviously we predict everyone will win and win by fairly large margins.

In the first three cases, we have clear packing where they're expected to win by very large margins, where there's wasted votes. And in others, they're slightly smaller, out in most of these, it's quite large.

In the next column labeled—under the prediction labeled "Tilling," we have what might seem at first glance to be packing. It might seem that way. Now, let me show you what it might seem before I convince you that's not right.

The prediction is that under the Tilling plan, the proportion of the votes would be higher than under the current plan. So in the—in most of the districts, not all, but, for example, in District 25 under the current plan or district 30 under the Tilling plan, the [54] incumbent member of the House will receive 54 percent of the vote, whereas in Tilling's plan, they would receive 75 percent of the vote. So this is the Democrats' argument or the plaintiffs' argument in a sense, by showing that those proportions have increased, it seems at first glance, without doing a more sophisticated analysis, like there is packing. However, one would not want to, as we've mentioned several times already today, one would not want to draw districts to suit particular incumbents. One draws districts to benefit in this case the minority community. If the—suppose the incumbents decided not to run. What would happen? God forbid, suppose, you know, one of them died. There's many things that can happen.

Now, one of the most important things about incumbents, we wouldn't want to draw districts for incumbents. So the last column is another prediction also of the Tilling plan, but this under the hypothetical situation in which the incumbents decide to retire or not run, so the hypothetical situation instead would be an open seat election.

So if we look at that column, since the incumbency advantage in Ohio is something less than around ten percent, those figures are about ten percent lower than the second to the last column. Those figures [55] seem quite clear in that they do not pack or waste minority votes. And I've replicated essentially the same thing from 1984 and 1986, 1988 and 1990. These are the first two years. It's a similar analysis in the years. The main thing that

would differ from year to year is just the size of the incumbency advantage, which seems to shift around as political fortunes shift, as they often do.

So the question is, what's a district which would be fair to the minority community? What predicted proportion of the vote would be fair? Well, these are predicted proportions of the vote under certain kinds of specific contextuals.

The last column is that the incumbent decides not to run, but there's plenty of other things that could happen. For example, if the incumbent decided not to run and the Republicans decided to fund somebody adequately, which they tend to do, which they have not done very frequently in these districts, then these proportions would be a lot lower.

So they're certainly not packed districts, but, on the other hand, it seems to me that black incumbents would still be likely to win in these cases.

Finally, I'm going to make a couple of very brief remarks about partisan fairness. This is an [56] analysis that I did, most of which actually I did before I was—several years before I was involved in this case, in fact.

At that line, this line represents the degree of fairness of the Ohio electoral system. When that jagged line is below the horizontal line at zero partisan bias, that's bias in favor of the Republican party. That means that the Republican party would be getting more seats than it deserves under specific political fairness criteria.

In 1968 and 1970, the Ohio State House was biased in favor of the Republican party by a good deal. Then came the 1971 redistricting plan, and that bias—that changed the electoral system. You can see that line shooting up to above zero, and, in fact, it stayed biased in favor of the Democratic party for the rest of the decade through 1981, and since the 1981 reapportionment plan didn't change very much, it stayed roughly for the next two decades.

The effect of the 1971 redistricting plan, which is still with us, it remains the largest effective political gerry-

mandering ever noted in the academic literature, and that's the plan that exists now.

And finally, if you want me to look at the graph that you were putting up at one time. You can see—and [57] this is sort of a quick summary of it. You can see why both sides are arguing about this. In the Tilling plan—well, actually, let me just make the first point. That is, under the current districts, you see that solid line there, that's just the same piece from the previous graph, so that's biased in favor of the Democrats, and as Mr. Collier said, the Democratic plan is above that. The Republican plan—and you can't quite see it since the bottom of it is—the bottom of the word "Republican" is a little bit obliterated—is the lowest, which means it favors the Republican party most.

And the Tilling plan is fair. When you have a chance here—you've passed a fair plan. That's something that you should pay attention to.

Thank you.

CHAIRMAN VOINOVICH: Questions?

MR. COLLIER: To very quickly. Did you come up with a range relating to incumbency advantage?

DR. KING: The size of the incumbency advantage? Yeah. It is between roughly six and roughly ten percent of the vote.

MR. COLLIER: We'd just indicate for the record that each and every one of the exhibits that have been described today are in the exhibit books in volume seven.

SENATOR ARONOFF: Mr. Chairman, while Mr. King [58] is here, and I believe that this is a similar question to that of Mr. Collier, but take a hypothetical, for example, Representative Mallory's district. Representative Mallory is an incumbent that wins, although he has 45 percent minority Afro-American population. If Mr. Mallory were not a candidate in that district or a similar district and the Republicans decided to fund a strong candidate in that district, would there be the possibility or the probability of the Republican winning?

DR. KING: Well, I'd have to look into the specifics of that particular race, so I won't give a definitive answer about that particular race, but in—you mentioned—you asked it as a hypothetical question.

SENATOR ARONOFF: A hypothetical.

DR. KING: Certainly in districts like that, they would risk losing the district, yes.

* * * *

[84] [Secretary Tilling]

The other changes which are taking place in the urban counties, I want to stress this very carefully. It shows you what happens when you make what is a technical correction, that shows you it can have a significant impact on a very crucial policy variable, and that is black population. The changes that are made in the urban counties result only from going into the plan and trying to remove splitting of more than one political [85] subdivision between districts; nothing more, nothing less. And I would point out—and I know that the counsel for the other side is aware of this because many of these examples were given to us in the deposition provided by Bob Dykes, and we found some in our analysis where we had essentially split more than one political subdivision between districts. And so in going back and correcting that—and that's what these maps and corresponding charts reflect—that's why this plan is labeled as it is. It is the plan adopted by the Apportionment Board on October the 3rd with these technical corrections, and they are entirely, with the exception of Marion County, changing ward boundaries to make only one split between districts. All right? That's all it is. There's no ulterior motive. There's no skulduggery involved here. We've given you the legal documentation, the maps. You'll have plenty of opportunity to take a look at them and examine them, and we would like your response to that. But the fact is that because the original purpose of the plan was to try to maximize black voting strength in minority

districts, and we split political communities to do that, when you go back in and combine these communities into whole political subdivisions, you will either raise or lower the minority population, and there's nothing that can be [86] done about it. And I'll give you a couple of examples of this. Does everyone have a copy of the maps? Okay.

Let me give you a couple of examples of that. Of course, in Cuyahoga County, there are no changes, except I believe in Bedford and in Bedford Heights, because in each of these, we had one split precinct which we have now combined. One was the precinct in Beachwood, and the other, if I can find it—we basically restored communities to their whole status. So that effectively Cuyahoga County, with those two exceptions—and you can see, as I would read you the percentages, for example, and I'll read this. This is House District 8, black population 65.64, exactly the same number as in the majority plan as adopted, 62.30 for House District 9, exactly the same. So each of the minority districts in Cuyahoga County are not affected at all by the population changes or by the minority vote population.

In Franklin County, we have District No. 21, which in the version that we passed had a black population of 55.92. And you can see that by combining wards and precincts, that population has now dropped to 54.32, a minor change, but, nonetheless, one that you need to be aware of. In District 22, the black population in the plan that we passed was 48.29, and that is dropped to 44.68, so that is a more significant [87] change. but again, it results solely from combining political subdivisions and essentially made a difference here of about three percentage points.

In Hamilton County, District 30, in the plan that we passed, approximately had 61 percent black population, Representaitve Rankin. That is now down to 55.98 or essentially 56 percent, so a difference of five percentage points.

Representative Mallory, who came before this Board and asked that he not be given additional blacks, the plan that we passed by the Board on October the 1st, Representative Mallory had 59.3 percent black population. The current plan has 47.26. And again, I want to make it clear, because that is a very significant decrease, and you can look at it on the map and you'll see exactly what we're talking about. That is only a result of recombining political subdivisions, and there's no other motivation whatsoever. But it points out, and I think you want to examine these numbers in real detail. It does illustrate what happens when you follow the Ohio Constitution, not the Voting Rights Act. There is a significant difference in minority population in some areas. And we would appreciate input from the minority community on this. This is an amendment we're laying on the table for consideration, and because of the detail [88] and minuteness involved, it's going to take a little bit of time to go through and satisfy yourself that, in fact, A, we did what we are saying, and B, are those results significant enough to accept the amendment or stick with the original plan.

So that essentially is what I want to say, and I'll turn it back to the Chair.

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EXHIBIT C TO NOTICE OF FILING RECORD
(Apportionment Board Transcript: February 18, 1992)
[Docket #147]

[47] DR. KING: I would like to introduce Exhibit 120. This is a slight extension of the exhibit that I presented last Tuesday here. It includes the 30 districts with the highest proportion of blacks in the state under the current districts, under the Tilling plan, which is what the majority passed, and under the Democrat 7(D) plan. As I understand it, the plan that was introduced today is the same for the districts that I am talking about.

If you look at this, this just lists from top to bottom the highest—the district with the highest proportion of blacks. And as you can see again in the current districts, that is the '81 districting plan, there is a few districts at the top where blacks are packed very heavily into that district. And as I mentioned last time, under the Tilling plan the districts are unpacked. Their wasted votes have been pretty much eliminated.

[48] Under the 7(D) plan, that's somewhere between the two plans, so you can seen that the Democrats have gone partway from the '81 districts to the current—I am sorry, to the Tilling plan—that is to the majority Board apportionment plan. For example, there is one additional majority minority district under that plan, whereas there is four additional under the Tilling plan.

In addition, they used to use the number of districts under ten percent as a figure, and/or they have previously, and you can see that the number of districts under ten percent is the smallest in the current plan, it is somewhat larger in the Democrat 7(D) plan, and even larger in the Tilling plan.

Finally, you can look at the—another way to cut the same exact data is the number of districts with greater than 35 percent of the vote. And it's the same under the current and 7(D) plan, and it is one larger under the Tilling plan.

So my conclusion last time was that the Tilling plan is, was drawn as the majority plan was drawn in order to combine minority votes which were scattered across the districts throughout the state into districts which would empower them. And the 7(D) plan does go partway in that direction. It doesn't go as far as the Tilling plan. Okay. That's the end of Exhibit 120.

[49] I would now like to make about six points about some of the testimony I heard this morning.

First, Mr. Gilliam quotes Mr. Henderson, their expert witness, who makes the point that if 99 percent of blacks supported a black candidate and 98 percent of whites support the candidate, then you presumably would call this, quote, a degree of racially polarized voting. Well, yes, this is a degree. And that was a, quote, racially polarized voting, but a small degree. Of course, the whole example is absurd since the degree of racially polarized voting that I showed was between 35 and 40 percent. In fact, even Henderson's exhibits show this level of racially polarized voting.

Any politician I have ever met would call it an extremely important fact that running a black rather than a white candidate reduces the political party's electoral margin by, among white voters, by 35 to 40 percent. There are few other factors in politics that can generate a political effect this large with such incredible consistency. Anyone who might ignore it is just not being realistic.

Second, Mr. Gilliam defines racially polarized voting in a slightly different way, and that is a situation in which a majority of whites vote against the black candidate, and the majority of blacks support this [50] candidate. It seems to me that this is a perfectly reasonable definition for some purposes, but it is hardly useful for others if it ignores race-based voting of enormous political significance such as exists all over the State of Ohio.

But nevertheless, let's focus for a moment on the evidence for this definition of racially polarized voting.

Mr. Gilliam this morning presented quite selective evidence in his presentation. He showed that only—he showed—he spent quite a lot of time in an overhead talking about four of the eleven minority districts with very high cross-over voting percentages.

Why is it that he only presented these four districts? Well, the answer actually was presented later on. He showed it to us only for a second, but the last slide he presented here this morning did list more detail, and it shows that about half of the districts he analyzed or Mr. Henderson analyzed had cross-over voting of less than 50 percent, which meets Mr. Gilliam's definition of legally significant racially polarized voting, at least that part of it.

Third, according to Mr. Gilliam, Mr. Henderson is quite familiar with the testimony of others in court; however, Mr. Henderson unfortunately is not quite as familiar with what experts in this field perhaps should [51] be, and that is the scholarly academic literature on these questions. It's our responsibility as experts to provide the court and this Board with the best evidence available, the best data available and the best methods available. We all use the same data, but Mr. Henderson based his analyses on methods that were the best available information in the 1950s.

In contrast, I used these methods as well as methods developed during the last 40 years of scholarly writings and methods which were developed since the ones Mr. Henderson used, and also the Thornburg decision.

One type of information that one cannot provide with the methods of the 1950s, or at least not particularly well, is accurate forecasts of how well black candidates would do if the current incumbents were to retire. Most seem to believe that districts are drawn to represent people and not incumbents, and so this type of accurate and reliable forecast which is possible with methods now standard in the academic literature is useful. The Democrats provided no evidence about this issue at all.

The only such analysis presented in the trial or in front of this Board was presented here and it happened to be by me. And it showed very clearly that blacks are not being packed into districts. It also [52] shows that Democrats are not being packed either.

Another type of information that one could not reliably provide with the methods of the 1950s used by the Democrats was to forecast what would be the case in newly drawn districts. All the information presented this morning was about the 1981 districts only, which due to population changes don't exist any more. The plaintiffs also provided no information at all about the effects of the incumbency, about voting in primaries, or about numerous other factors, all of which we provided.

Why have blacks won in districts with white cross-over voting and racially polarized voting? Because in these districts the cross-over effect plus incumbency exceeded the racially polarized effect.

How do we know that this would be the case in newly drawn districts? How do we know this would be the case if incumbents retire? The second question is most important, I think. We can only know if one provides reliable forecasts. The Democrats provided no forecasts. I am not accusing them of providing unreliable forecasts because they didn't provide any forecasts at all.

I did provide those forecasts, and they show clear racially polarized voting and clear evidence that [53] black nonincumbents would do considerably less well than the present incumbents in those districts.

Fourth, in his affidavit, although it wasn't mentioned verbally this morning, Mr. Henderson spent some time accusing me of using what he calls the one equation rather than the two-equation method. As I have previously mentioned, he used a method which he calls two-equation method, but in fact actually it only involves one equation. But whatever it is, he calls it the two-equation method. This was developed in the 1950s. I used this method as well as others, and he apparently—well, the

plaintiffs have apparently missed an enormous scholarly literature that has gone a lot beyond this.

Mr. Henderson also claims to use a very popular computer program in existence for about 40 years for his analyses, and this is a very good computer program for many purposes, but it is not up to the task of analyzing redistricting plans with modern methods of political science and statistics. In fact, a computer program that I wrote under a National Science Foundation grant and provided, and I provide free of charge to anyone who asks, is being used in many states throughout the country to evaluate their redistricting plans.

PRESIDENT ARONOFF: I might add, that is the [54] only thing free in this whole proceeding.

DR. KING: Fifth, Mr. Henderson also talks about something called standard errors, in response to my criticism of him in the court trials for not presenting the standard errors, that is. Standard errors are just a quantitative estimate of the uncertainty of one's conclusions. It sounds like an awfully technical issue, but it is not technical at all.

The idea of presenting estimates of uncertainty along with analyses has always been understood formally by scholars and I believe intuitively by everybody else. It has also been in the public realm fairly formally for several years. For example, in the New Hampshire primary, you have heard polls trying to predict who is going to win. Nowadays these are reported with a margin of error. The candidate, Dan Rather says, will get 60 percent of the vote, plus or minus five percent. Plus or minus five percent, he says, is the margin of error. That is based upon what is called technically standard of error. It is a quantitative estimate of uncertainty.

We all, I believe, understand this. If someone reported a poll without a margin of error we would want to know what it is. If someone reported a poll with a margin of error of 50 percent it wouldn't provide very [55] useful information.

Any time you are given the opinion of an expert you should demand assessment of uncertainty of his or her inferences. Mr. Henderson provided none and none was asked for them to refuse to provide. This means one of two things. Either he is asserting that he knows everything perfectly, which is an absurd assertion from whoever makes it, or more likely he has no idea how certain or uncertain his results should be, or are.

Whichever it is, it is hard to take conclusions such as these in particular seriously. Let me just give you one more example. You go into your doctor's office and she says that you need an operation. She says you will probably live through this operation. Now what is your next question? My guess is your next question will be, how sure are you that I will live through this operation? What are my chances? How, you know, what is your level of uncertainty.

Mr. Henderson as your doctor says you don't need to know this, it is just not important.

Sixth, and finally, I want to say one final word about partisan fairness. You can't really blame the Democrats for preferring to run under something like the current districts which is, which are heavily biased in their favor. But the fact of challenge of an [56] argument does not prove these claims.

In fact, Mr. Gilliam has made a lot of arguments about how biased he believes the current districting plan is against the Democrats. He contends that all of the Republicans' concern for minorities is really just a veiled attempt to do political gerrymandering favoring the Republicans.

Attention to the Voting Rights Act, he contends, is just a way of sneaking in a partisan Republican gerrymandering. He made these arguments at the Federal District Court trial, is the first I heard of them. But in his closing arguments in that trial he withdrew them entirely and said he was no longer making a political gerry-

mandering claim. However, he has now brought them up again.

I think whatever the state of their argument is, it is worth saying that at no time, at no time in court or in front of this Board, or in any deposition, did he or anyone, any expert for the Democrats, provide any evidence whatsoever for this assertion. It is not just that they provided unreliable evidence like they did in their analysis of certain parts of the analysis of racial bloc voting; it is that they provided no evidence, no evidence whatsoever, for the fact that this is a partisan gerrymander. Why is that Because as my analysis showed earlier, this plan is fair.

Thanks.

* * * *

[JOINT EXHIBIT 15: FILED FEBRUARY 19, 1992)]
[Apportionment Board Transcript September 30, 1992]
[Docket #151]

[89] MR. ARANOFF: Before Mr. Tilling makes his presentation, Mr. Chairman, on behalf of yourself, Secretary of State Taft and myself, we recognized our [90] obligation to recommend a legislative reapportionment plan that complies with the requirements of the Constitution of the State of Ohio and the Constitution of the United States with the latter prevailing in the event of conflict. We have attempted to develop a plan within the general guidelines provided by the United States Supreme Court in its one person one vote jurisprudence.

We directed Jim Tilling and his staff to draft the plan redistricting the legislative districts of the Ohio House of Representatives and the State Senate. First and foremost they were instructed to follow the mandates of the United States Constitution as interpreted by the numerous redistricting and apportionment decisions of the United States Supreme Court. The plan was to be in compliance with all applicable federal statutes with special emphasis to be paid to conforming with the provisions of the federal Voting Rights Act. The draftsmen were cognizant of the findings of the federal court in the Armour case and were directed to conform any proposed plans to the court's orders and findings in that decision.

For the first time in Ohio history we sought through the public hearing process input from all sectors of the state: geographic, political, racial and ethnic. Especially we sought input on the process from minority [91] community representatives. The specific direction provided to staff was to create representative districts which maximized the effective representation of Ohio's significant ethnic and racial minorities.

It is our objective in recommending this reapportionment plan to achieve fair and effective representation for all Ohio citizens. We concluded that this can best be

accomplished through the preservation of county and political subdivision boundaries as delineated in Article XI of the Ohio Constitution in determining legislative representational districts. The U.S. Supreme Court has recognized that the state may decide that its strong interest in drawing electoral district lines along county and subdivision boundaries justifies variations between districts' relative populations. Staff was to construct a plan conforming with the provisions of Article XI of the Ohio Constitution and meeting the mandates of Federal Law and the United States Constitution. The Ohio Constitution requires the creation of districts which preserve county boundaries and political subdivisions wherever possible within the restraints of substantial population equality.

Ohio counties and political subdivisions are accurate representations of divisions between social groups, economic interests and political communities [92] within the state. Article XI of the Ohio Constitution recognizes and emphasizes the Ohio public policy that legislators can best represent their constituents and voters can more intelligently exercise their ballot franchise when their legislative districts are compact and contiguous rather than fragmented units divorced from and indeed possibly in conflict with the various other political subdivisions established by the state.

Members of the legislature are less likely to be visible and identifiable to their constituents if legislative boundaries are independent of other existing political boundaries. It is easier for citizens to identify their interest in their county or other political subdivision than in a legislative district whose boundaries are unknown to all but the most devoted political activists. A simple inability of the electorate to understand who their elected representatives are or what citizens their legislators represent can contribute to increasing voter apathy.

To link disparate geographic groupings of Ohio citizens simply to effectuate an exact degree of population

equality replaces the ultimate objective of legislative districting: fair and effective representation with numerically more equal but unfair and ineffective representation.

[93] Representative government is a process of accommodating group interest through democratic institutional arrangements. It is a legislative function to channel the numerous opinions, interests, and abilities of the people of Ohio into the making of the State's public policy. Appropirate legislative apportionment, therefore, should be legally designed to insure fair and effective representation of the legislature of the various groups and interests that comprise the electorate. In practice, of course, this ideal can only be approximated in any particular apportionment system by realistic accommodations of the diverse and possibly conflicting political forces operating within Ohio.

As Chief Justice Warren observed in 1964, indiscriminate districting without any regard for political subdivision or natural historical boundary lines is little more than open invitation to partisan gerrymandering. Some states, freed of a duty to follow county or other subdivision lines, have used their freedom to draw district lines to maximize the political advantage of the party temporarily dominant in the state's public affairs, a situation that has attracted increasing judicial criticism. We have only to look at the redistricting process in our sister states to find [94] numerous examples from the 1980s of partisan gerrymandering. A redistricting process that seeks the goal of fair and effective representation with only precisely equal numbers as a guide would tempt most partisans beyond their ability to resist. Incumbency partisan interest and personal invective could become the building blocks of the process replacing community of interest used in Ohio's more traditional subdivision based system.

The new technology available to redistricters provide those in the majority with a tempting means to discrim-

inate against any minority, political or otherwise. If county or other subdivision boundaries can be ignored, a personal computer can produce countless plans of absolute population equality but each having its own very different political impact. Computer techniques make it easy to create equally populous districts without regard to existing political lines but with regard to the political affiliation of the residents of those districts. Computers now make it possible to generate a large number of alternative plans consistent with equal population in a relatively short period of time and to analyze the political characteristics of each one in considerable detail. By using demographic growth projections, future characteristics can also be [95] accurately predicted.

The proof of this statement is found in many redistricting plans that followed the 1970 and 1980 census. The hope that gerrymandering would be self-limiting or correcting has not been realized. Partisan gerrymanders have scarred the fact of some state politics for the whole decade of the '80s. Gerrymandered districts can control the outcome of elections without effective regard of the will of the electorate. Ohioans do not want the draftsmen of the plans rather than the voters to determine legislative majorities. This would not be fair representation.

For the record, we should point out that for the first time in Ohio history computer technologies were made available to the public to develop apportionment plans. Some of the plans submitted to and reviewed by the Board were developed through the use of these public access computer terminals and contributed to the plan being sponsored by the Republican members of the Board.

In conclusion, we directed that our plan be fair to various partisan political interests. It is. It will create a more competitive political process in the selection of Ohio's legislators. It is our hope and belief that this plan will mean the end of partisan and racial gerrymandering in Ohio.

[96] The right to elect representatives is every citizen's portion of sovereign power. I believe the proposed reapportionment plan sponsored by Governor Voinovich, Secretary of State Taft and myself provides every Ohio citizen a fair and effective portion of the state's sovereign power. Thank you.

* * * *

[PLAINTIFFS' EXHIBIT A:
FILED FEBRUARY 19, 1992)]
[Docketed following Docket #154]

[Plaintiffs' Summary of Selected Portions of
Public Hearing Transcripts]

[ii] INTRODUCTION

The 1991 Ohio Apportionment Board conducted public hearings across the State of Ohio in August and September 1991. Twelve of the hearings were transcribed by a court reporter. Counsel for Defendants Ferguson, et al. have collected various quotations from the public hearings, as well as the meetings of the Apportionment Board, and such quotations are categorized into ten areas: (1) The "Mandate" to Create Majority-Minority Districts, (2) the "Totality" of The Circumstances, (3) "Minority Districts Must Be Drawn First, (4) Armour: Its Impact and Meaning, (5) Conflicts Between State and Federal Law, (6) Residency, (7) The Plan Will be Scrutinized by The Court, (8) The 1981 Plan Protected Minority Interests, (9) The Census Undercount, and 10) Whose Plan is Whose.

Selected portions of the transcripts from which the quotations are derived will be submitted to this Court simultaneous with the submission of this document.

The public hearings and meetings from which quotations were gathered are as follows:

Akron, Ohio	September 12, 1991
Athens, Ohio	September 3, 1991
Cambridge, Ohio	September 3, 1991
Canton, Ohio	September 4, 1991
Chardon, Ohio	September 5, 1991
Cleveland, Ohio	August 28, 1991
Columbus, Ohio	August 27, 1991
Columbus, Ohio	September 7, 1991
Dayton, Ohio	August 29, 1991

Mansfield, Ohio	August 28, 1991
Strongsville, Ohio	September 5, 1991
Toledo, Ohio	August 26, 1991
September Board Meeting	September 30, 1991
October Board Meeting	October 1, 1991

THE "MANDATE" TO CREATE MAJORITY-MINORITY DISTRICTS

"The courts have said wherever you can create a majority-minority district, you must do so, it's just that simple." Tilling, p. 8. (Toledo)

". . . there's absolutely no question that we want to do the very best job possible to protect minority voting rights and enhance their district." Tilling, p. 47 (Toledo)

"There have been countless decisions by U.S. district courts and by the U.S. Supreme Court that have stressed the importance of creating minority districts. And I would like to go on the record here, as I have at our two previous meetings, as saying that it is the firm commitment of the Apportionment Board to adhere to the Supreme Court guidelines in creating the maximum number of minority districts possible in the State of Ohio. There is absolutely no doubt in the mind of anyone who has followed this process through the courts that *we are under a mandate that wherever a majority-minority district can be created, that must be done. It is beyond the realm of discussion.* It has been firmly established by the U.S. Supreme Court fiat, and that is the primary operating principle that we must operate under." Tilling, p. 12. (Columbus 1) (emphasis added)

"So for those of you thinking about getting involved in this process and drawing maps, I would urge you to review the Supreme Court decisions, and *I want to make it clear that any plan that's submitted that does not make the creation of a maximum number of minority or majority minority districts that is possible, that plan is in serious jeopardy with the Apportionment Board and with the courts.* So that is the single most important change that has taken place in the redistricting process over time and the one that is most clearly spelled out in court decisions." Tilling, pp. 12-13. (Columbus 1) (emphasis added)

"What the Supreme Court has said loud and clear is persons doing reapportionment and redistricting throughout the United States have an obligation not to dilute minority voting strength so that where a majority-minority district can be created, and by that I mean a district in which minority voters can make up the majority of voters in that district—it's a bit of a curious phrase until you understand it—but where a majority-minority district can be created, they must be created.

"It's just that simple. So that our obligation in Cuyahoga County, and every one of the 88 counties that make up the State of Ohio, will be to ensure that minority voting strength is not diminished and, where possible, is increased." Tilling, p. 6. (Cleveland)

"There is absolutely no question what the law says on this issue. And we are going to make sure that minority voting strength in Cuyahoga County and in every county in Ohio where this issue is relevant, minority voting strength is not diluted and, if possible, we are going to do our best to enhance it." Tilling, p. 13. (Cleveland)

"The first one that's clear cut deals with minority voting districts and here, although it's not mentioned at all in the Ohio Constitution, the U.S. Supreme Court and federal court decisions at all levels have made if very clear that it is an obligation of policymakers at the state and local levels, too, for that matter to do everything in their power not to dilute minority voting strength, and in fact, where possible, to increase the number of those districts if population trends make that a feasible alternative. That is the first guideline we are operating under.

"It stems from the U.S. Voting Rights Act of 1962 as amended in the 1980s and modified by the Supreme Court decision. And simply stated, although this may not be the most important concern facing some of you here, the criteria we're operating under is where a minority dis-

trict can be created, we are under an obligation to do that.

"And one of the things we've tried to assure members of each community of is that we are going to adhere very closely to the tenets of the Voting Rights Act and the Supreme Court decisions and do our very best to assure that minority districts are not diluted and, where possible, the number of minority senators and representatives can be increased." Tilling, pp. 5-6. (Mansfield)

. . . the thrust of those Supreme Court decisions is that, where it is possible to draw a majority minority district--a little bit of an unusual term—for those of you not familiar with the process I'll explain it.

"Essentially that is a district where a minority group, whether it's black, Hispanic, language or other minority, can be a majority in a legislative district, State or city, county level. Where that can be done, the Court is mandating decision-makers to do that.

"So that is really a very clear obligation that that board is going to operate under. Furthermore, they are saying that, while they're very interested in not diluting minority voting representation, they're equally interested in expanding that influence where that is possible.

"So, as we look at plans, one of the top priorities of this Board is going to be follow the decision of the U.S. Supreme Court, not to dilute minority voting strength and, where possible, increasing that strength." Tilling, p. 8. (Dayton)

* * * *

[3] "The next thing we have to do really is not in the Ohio Constitution at all, but is really mandated by the decisions of the U.S. Supreme Court, and what they have said—and *this is really an ironclad rule that we have got to operate under—we've got to do everything in our power not to diminish the number of minority dis-*

tricts that are present. And if possible, if there is a way to increase those, we have to try and find that." Tilling, p. 13. (Cambridge) (emphasis added)

"In a whole series of court decisions the operating rules that we are governed by have been set down and effectively I summarize that it's very simple. You can't dilute black or other minority voting strength and if possible you must work to enhance." Tilling, p. 10. (Canton)

"The Supreme Court decisions have made it very clear that those persons designing legislative or city council or any districts, for that matter, that involve minority representation, those decision-makers are under an obligation to not dilute minority voting strength and in fact, where possible, they are instructed to try and increase minority voting strength." Tilling, p. 10. (Chardon)

[4] "The first area of court cases is very clear and involves minority voting rights, particularly what are called the creation of majority/minority districts, that is, districts where a minority group can, in fact, be made a majority in a legislative district. And the court directive that we are bound to follow is that there can be no deletion of minority voting strength. There've been a whole series of cases documenting this point and it is crystal clear and direct." Tilling, p. 8. (Strongsville)

". . . the mandate out there for policymakers to operate under is absolutely crystal clear, and the guideline that we as an Apportionment Board must follow is there can be no dissolution of minority voting strength, that *the number of minority districts must be maintained and where possible, they must be increased, and that's very simple; doesn't take a genius to figure it out. It's black and white. It's clear.* That's the mandate we're operating under." Tilling, pp. 10-11. (Columbus 2) (emphasis added)

". . . the members of the board, majority and minority alike, are under a court mandate to protect minority voting districts.

"And in fact the decision that we are operating under is that minority voting districts cannot be diluted and where possible must be increased." Tilling, p. 25. (Akron)

* * * *

"The specific direction provided to staff was to create representative districts which maximized the effective districts which maximized the effective representation of Ohio's significant ethnic and racial minorities." Aronoff, p. 91. (September Board Meeting)

* * * *

[5] THE "TOTALITY OF THE CIRCUMSTANCES

". . . we are not going to allow for the depletion of black districts. . . . The Court basically has set parameters of 51 to 65 percent for the development of majority-minority districts, but they have also made it clear that you must take into account local factors specific to each individual community so that in some communities, 51, 52, 53 percent might be very acceptable and you might be able to show by recourse to the record that that's a sufficient number in that district to elect minorities.

"In other districts, 65 might be necessary and in some rare cases you might go beyond that, as you indicated in your remarks, beyond that 65%." Tilling, pp. 45-46. (Toledo)

"As many of you in the audience may know, the Supreme Court has set some rough parameters that we can use ranging from 51 to 65 percent, but they've made it clear that those are only guidelines and that *the situation could vary from locality to locality and conceivably even*

could vary within one community, depending upon the demographic makeup or other factors, so the most important thing from your prospective—and we're working with other representatives of the NAACP in other cities around the state—is to let us know, and really you need to be as specific as possible in indicating what are, in your view, the requisite percentages so that we don't go over 65 percent unless there's some compelling reason to do so and do not go too low and, therefore, achieve something on paper which is not really accomplishable in reality." Tilling, pp. 28-29. (Columbus 1) (emphasis added)

"But on the other hand, they're very strict admonitions agaist trying to pack all minorities into a single district under the guise of creating a majority district. That is also not allowed. And so there's a relatively narrow range available to members of the Apportionment Board in which they can draw majority-minority districts.

"And what's important, and one of the reasons that we need hearings like this around the state is, *that the acceptable percentage may vary from city to city because it does involve past examples of discrimination.* It involves popularity of individual candidates. And so while in one city you might be able to draw majority district, or a candidate can win with 55% black voters, in another city it might take 61 or 62." Tilling, p. 9. (Cleveland) (emphasis added)

* * * *

[6] "*We need to establish for the record and totality of the circumstance in each urban area in order for us to do our job correctly*, so we need your help and we need the help of other minority communities around the state, but that is our interpretation of the *Armour* case and the Voting Right[s] Act as well, so I appreciate very much your comments." Tilling, p. 33. (Columbus 2) (emphasis added)

"I'm also counsel to the Republican party, and all around the country there has been alleged to have been

a conspiracy of Republicans and minorities to make more minority districts to make more Republican districts. That is in part true, but I must tell those of you in the African-American community that the political reason has more to do with Hispanic members around the country than even the African-Americans." Strauss, p. 85. (Columbus 21)

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[BRIEF OF PLAINTIFFS IN RESPONSE TO THE FEBRUARY 19, 1992 FILING OF DEFENDANTS: FILED MARCH 6, 1992) (part)]
[Docket #160]

[caption omitted]

I. *INTRODUCTION*

This Court was very explicit in its Opinion and Order, Opinion, Jan. 31, 1992, *Quilter v. Voinovich*, No. 91-CV-2219 (N.D. Ohio) (hereinafter "Opinion"), when it said, "[a]ccordingly, the Board is ORDERED to reconsider the [1991] Plan." Opinion, p. 16. The Court's additional statement, "unless it [the Board] can show justification under the totality of the circumstances test for the present configuration, the Board must submit a revised plan to this court within 20 days of the date of this order." The Court's further admonition that a failure to either show justification or submit a revised plan would result in the Court dealing with this matter "*sua sponte*," was also unambigouous. (Opinion, p. 16).

When the Board filed its response on February 19, 1992, it purported to submit the necessary additional "totality of the

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[11] population." Board Finding No. 69, page 25. No "totalities" showing was supplied to the Court. The previous district represented by minority Representative Jones was 72% Democratic; it is now 83% Democratic.[12]

As the Affidavit of Robert Dykes shows in greater detail, all of the foregoing urban areas where the Board ignored the Section 7 mandates of the Ohio Constitution in the name of an asserted "compliance" with the Voting Rights Act.

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[12] Exhibit 4 at p. 21, n. 1.

B. Tilling Testified That Changes in Black Population Figures Were Done on a Race-Conscious Basis

To underline the point that legislative boundaries were drawn on a race-conscious basis in the 1972 plan, Mr. Tilling testified before the Board that the reduction in black population percentages in the 1992 plan, while regrettable, was done to satisfy the regression analysis of Dr. Henderson (Plaintiffs' expert).[13] Tilling said that he reviewed Dr. Henderson's analysis of white crossover voting and then, applying his (Tilling's) judgment, adjusted the black population figures accordingly. To understand how profoundly Tilling misses the point, it is necessary to quote his own words at length.

> "Mr. Henderson provided data indicating what the white-over voter was in the minority districts outside of Cuyahoga County."
>
> [12] So, for example, in Districts 21 and 22 in Franklin County, he indicated what white cross-over vote was for Representatives Beatty and Miller. And we have examined that, and by his own documentation we have determined that Representative Beatty received 50 percent of the white cross-over vote, Representative Miller only 44.5 percent. And in my view certainly, and I would ask the Board to consider this, I believe that is a very significant finding of racially polarized black voting.
>
> Nonetheless, in making the changes that we have done, we have taken into account the fact that both Representatives Beatty and Miller have been elected, and we indicate that on this same chart that Mr. Henderson provided, *we were criticized for increasing the minority percentage in those two representatives' districts, and we are lowering that by these*

[13] Hearing, Feb. 18, 1992, pp. 60-61.

technical corrections by approximately 2 percent in Representative Beatty's district and 4 percent in Representative Miller's district. (Emphasis added.)

Excuse me. They still, however, are substantial minority districts with black population, black voting age population of 48.3 percent for Representative Beatty and 41, 40.98 percent for Representative Miller. *And I believe those minority populations and configuration of the districts will insure that black voters in those districts are able to elect a candidate of their choice.*" (Emphasis added.)[14]

Purporting to react to Dr. Henderson's analysis, Mr. Tilling, on behalf of the Board, applied the same method in Hamilton County, *i.e.*, without any "totalities" evaluation he arbitrarily reduced the 1991 plan's black population percentages for Representative Mallory by 10.6% and minority Representative Rankin's black population figures by 5.1%. Again, the nature of [13] the exercise engaged in by Tilling is best understood by reading Tilling's own testimony to the Board:

"In Hamilton County, where a great deal of the attention was focused during the court proceedings, Mr. Henderson's data show that Representatives Mallory and Rankin received approximately 51 percent of white cross-over voting, and we were criticized by the minority for increasing their black percentage even though the increases were approximately the same magnitude as the Democrats achieved in their own plan.

Nonetheless, taking this information into account, *we have reduced Representative Rankin's percentage in the direction that the Democrat minority has asked for by approximately 5.1 percent and in Representative Mallory's district we have reduced it by 10.6 percent.* (Emphasis added.)

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[14] Hearing, Feb. 18, 1992, pp. 60-61.

> What this means is that in terms of black voting age population, Representative Rankin's district still is 52.7 percent black voting age, and Representative Mallory's district is 43.1 percent black voting age, *and we believe again that this level is appropriate for black voters in those two districts to elect a candidate of their choice.*" (Emphasis added.)

Mr. Tilling's explanation for Montgomery County, where the Board again manipulated black population figures admittedly on a race-conscious basis, shows no consciousness of the necessity for a "totalities" evaluation:

> "In Montgomery County, again, this is a situation where Mr. Henderson has some data on cross-over that bear on this. In this particular case Rhine McLin gets by Mr. Henderson's calculations 35.4 percent of the white vote. Representative Roberts gets 46, essentially 46 percent, 45.98 percent.
> [14] Again, we were criticized for giving more minority voters to Representative McLin and taking them away from Representative Roberts. And we consulted here with members of the black community, and in particular Floyd Johnson, who is from Montgomery County, and the plan that is before the Board now reduces the number of black voters in Representative McLin's district by 10.8 percent and correspondingly increases the number of black voters in Representative Roberts' district by 8.3 percent.
>
> *Again, both of these changes are in line with the direction asked for by minority members of the Board.*" [15] (Emphasis added.)

Tilling also explained the 1992 changes in Summit County and Lucas County on the basis of race. As noted previously, in Summit County, minority Representative Sykes has enjoyed very substantial pluralities and high

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[15] *Id.* at 62-63.

white crossover vote. In Lucas County, minority Representatives Jones, in a district with 41.7% black population, received a plurality of 67.1% with white crossover vote of 44.4%; his average plurality in the years 1984-88 was 77.6%.[18] Tilling's testimony concerning these two counties was:

> "Looking at the figures produced by Mr. Henderson for Representative Sykes in Summit County and Representative Casey Jones, we found that both of them received less than 50 white cross-over vote, but we also examined the winning percentages in those two districts and we made virtually no change in Representative Sykes' district, and we reduced Representative Jones's percentage by only 1."

* * * *

[16] appears to be the true target of the Board. Tilling reveals his animus against this coalition in his following statement to the Board:

> "The other side of the minority's argument is that in every district where there are at least 13 percent black population, those districts always elect Democrats. And again that is also a fact. It's a fact because that has been the traditional technique used by Democratic map makers to solidify their control of legislative chambers. They split the minority community and use black voters as ballasts, and basically that is it, in order to support white incumbent Democrats.
>
> And the issue before this Board, which is inherent in the challenge of presenting the minority's case, is that you can in drawing fair districts maximize the opportunities for black voters to elect a candidate of their choice, or you can maximize the opportunities for white Democrats to retain control

[18] Exhibit 3.

> of the Ohio House of Representatives. But you can't do both." [19]

Tilling's logical fallacy here is criticizing two straw-men alternatives while ignoring the third lawful and legitimate choice, which is to follow the legal dictates of the Ohio Constitution and allow the black population figures to emerge naturally from that process. Indeed, the implicit admission by Tilling that he has drawn the lines to prevent Democrats from "splitting the minority community and using black voters as [17] ballasts" is an admission that the lines were drawn on a race-conscious basis for political purposes.[20]

III. THE BOARD HAS DRAWN BLACK DISTRICTS ON THE ASSUMPTION THAT PROPORTIONAL REPRESENTATION IS MANDATED

The goal of the Board appears to be to "guarantee" proportional legislative representation of black voters. The intent to achieve that guarantee is stated explicitly in Board Finding No. 168.

> "While there is a white crossover voting in the minority districts, except in districts in Cuyahoga County where the current black population in House Districts 12, 14 and 16 exceeds 70%, *there is insufficient black population in the minority districts to guarantee* the election of a black candidate particularly given levels of voter turnout and racial bloc voting in the district." (Emphasis supplied). *Id.* at p. 70.

[19] Hearing, February 18, 1992 at pp. 66-67.

[20] Mr. Tilling disagrees with both the *Quilter* majority and the minority opinion. His view is that the Board must "maximize" the black vote by creating majority-minority districts wherever possible. The dissenting opinion suggests that the maximization of the black vote is the goal of those who could prevent mandatory black majority districts.

The majority members of this Court, in *Armour v. Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), said that the issue in voting rights cases is not guaranteeing the election of black candidates but assuring the ability of the protected class to participate equally in the political process and to elect a candidate of their choice. "The issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a *candidate* [18] *of choice.*" (Emphasis in original). *Armour* Opinion, p. 33. In this regard, the key determinants are whether legally significant racial bloc voting exists such that it has usually prevented minorities from electing candidates of their choice, or whether black voters have had "*sustained* success" in electing candidates of their choice. *Thornburg v. Gingles*, 476 U.S. 30, 77, 106 S. Ct. 2752, 2780 (1986); *Quilter* Opinion, pp. 12-14.

A. Unless Legally Significant Racial Bloc Voting is Present, a Critical Element of the "Totalities" Test is Missing

Unless white crossover vote is insignificant and the remaining white voters vote as a bloc to prevent the minority candidate of choice from being elected, there is no "legally significant" racial bloc voting.[21] However, even in the absence of a record of legally significant racial bloc voting, the Board maintains that there must be black populations in the reconfigured districts sufficient to "guarantee" the election of black candidates, including non-incumbent candidates. In other words, the Board justifies its boundaries on the grounds that it is creating "safe" black seats. For example, Board Finding No. 183 states:

> "Since Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23

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[21] *Gingles*, 476 U.S. at 55-57, 106 S. Ct. at 2768, 2769. Notably, neither Mr. Tilling nor the Board expert, Dr. King, ever use the term "legally significant" to describe the racial bloc voting which they find no prevalent in Ohio.

> to increase the relative [19] percentage of black population in that district in order to provide an opportunity for a new black candidate, without benefit of incumbency, to be elected in the district." *Id.* at p. 82.

Similarly, Board Finding No. 187 states that in increasing the black population in minority Representative Rankin's district, Tilling adopted the rationale that Representative Rankin may not be a representative in Hamilton County through the year 2000; hence, increasing black population in her district gives "an opportunity for the next generation of blacks who might want to seek office in Ohio Legislator." [sic] Board Finding No. 186, p. 84. Tilling referred to Representative Rankin's black population falling "dangerously low and possibly jeopardize her chances for re-election." Board Finding No. 193, p. 91. In this same vein, with respect to Representative Sykes' district in Summit County, Tilling said, "[s]o we did try to prevent a black voter dilution by returning the minortiy community to Representative Sykes." Board Finding No. 194, p. 92.

In summary, instead of adhering to the clear messages of *Gingles*, *Armour* and *Quilter*, the Board has clamorously insisted that it had a mandate in the absence of "totalities" proof to "guarantee" proportional representation.

B. The Absence of Legally Significant Racial Bloc Voting

This Court made it clear that the aggregation of blacks into majority, minority districts in the name of compliance with * * *

**[Exhibit 1 (part) to
Brief of Plaintiffs in Response to the February 19, 1992
Filing of Defenants: filed March 6, 1992]**

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 5:91CV-2219

JUDGE NATHANIEL R. JONES
JUDGE JOHN W. PECK
JUDGE DAVID D. DOWD, JR.

BARNEY QUILTER, *et al.*,
Plaintiffs,

vs.

GEORGE V. VOINOVITCH, *et al.*,
Defendants.

AFFIDAVIT OF ROBERT R. DYKES

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

I, ROBERT R. DYKES, do hereby depose and state:

BACKGROUND QUALIFICATIONS OF ROBERT R. DYKES

1. My name is Robert R. Dykes and I reside at 16711 Lake Avenue in the City of Lakewood in Cuyahoga County. I am the President of Decision Research Cor-

poration and my business address is 1100 Statler Office Tower, Cleveland, Ohio 44115. I make this affidavit of my own personal knowledge.

2. I was born and raised in Cleveland. I have lived in Cuyahoga County all of my life except for about four years during which I lived in Columbus.

3. I graduated from John Adams High School in Cleveland. In 1960 I received a Bachelor of Science Degree in Physics from Case Institute of Technology (before it merged with Western Reserve University).

4. Upon graduation from Case I was employed by the then BF Goodrich Company in their corporate research center in Brecksville. At BF Goodrich I worked on a number of industrial research projects that involved the use of computers. At that time (the early 1960's), computers were beginning to play an important role in an increasing number of industrial research projects. After several years, the research center obtained its own on-site computer, and I was placed in charge of the newly formed research computer group.

5. In 1969 I left BF Goodrich to work for the City of Cleveland. At that time Cleveland had a large federal research grant and I was hired to be the Information Systems Officer of the Community Development Improvement Program. In 1971 I became the Director of that program. While at the City of Cleveland my group was responsible for maintaining and analyzing the 1970 census data for Cleveland.

6. In 1972 I went to work for the research department of the Greater Cleveland Growth Association as Information Systems Manager. At the Growth Association I was primarily responsible for responding to requests for data and information about Greater Cleveland from other staff members, companies interested in locating facilities here, and other organizations and individuals.

7. In 1973 I became the Research Director of the Ohio Democratic Party in Columbus, and was responsible for all of the research activities at the ODP.

8. In 1975 I formed Decision Research Corporation. Decision Research Corporation (DRC) is a full service market research company headquartered in Cleveland, Ohio. Decision Research conducts custom-designed market research and strategy development for diverse clients.

9. Upon its creation in 1975, DRC was involved primarily in political research for both ballot issues and candidates. It has since broadened its scope and expertise to include policy and planning studies in the public sector, communication and marketing studies for corporate and institutional clients, projects for public schools and colleges, and health care research.

10. DRC offers a full range of market research services including surveys (phone, in-person, mail), focus groups, Q studies, data base development, and computerized data analysis. DRC frequently provides ongoing consulting to its clients.

11. My experience with redistricting and reapportionment dates to 1971. At that time the City of Cleveland was a defendant in federal court with regard to the population disparity of its wards. Then Mayor Carl B. Stokes was also named as a defendant. At his request, and using the data from the 1970 census, I prepared a new ward plan for the city.

12. In 1981 my company, Decision Research Corporation, was retained by the Ohio Democratic Party to assist in the preparation of a new plan of apportionment for Ohio. That plan of apportionment was approved by a majority of the persons then responsible for apportionment. Decision Research Corporation also worked with the City Councils of Cleveland, Akron, Parma, and Barberton in 1981 in preparing plans for the redrawing of the ward boundaries for those cities.

13. In 1991 Decision Research Corporation was engaged by the Legislative Task Force on Redistricting and Reapportionment to work on the development of plans for both reapportionment and redistricting for Ohio. In addition, Decision Research Corporation was again engaged by the Cleveland City Council to provide assistance with regard to drawing new ward boundaries. We were also engaged by the City Councils of Akron and Parma to assist them in drawing new ward boundaries, and by the Summit County Council with regard to drawing the new County Council Districts as required by a recent charter amendment. On all of the redistricting and reapportionment projects undertaken by Decision Research Corporation I have acted as project director and principal researcher.

II. THE DEFENDANTS' 1992 PLAN VIOLATES ARTICLE XI, SECTION 7(D).

14. On page 11 of the Board Findings, the Defendants state that they complied with the requirements of Article XI, Section 7(D). Board Finding No. 34. On page 12 they say "the vast majority of the 1981 districts must be reconfigured because the population of such districts fails to satisfy Article XI, Section 3 of the Ohio Constitution." Board Finding No. 45. In fact, almost half (44 of 99) of the 1981 districts satisfy Article XI, Section 3. On page 14 they again say "[a]s a result of major population shifts within counties and from inner city to suburbs, the vast majority of the 1981 configured districts in all major urban areas had to be reconfigured to meet the population requirements of Article XI, Section 3 of the Ohio Constitution. Board Finding No. 52. That statement is not true.

15. In Cuyahoga County, Defendants show on page 15 that they are aware that five of the fourteen house districts created in 1981 (6, 7, [10], 13, 17) meet the population requirements of Article XI, Section 3. However,

they further state on page 17 that these same five districts ". . . cannot be retained intact given the population requirements of the other districts." That is not true.

16. The five districts (6, 7, 10, 13, 17) that meet the population requirements of Article XI, Section 3 are all contiguous with one another (see attached map A) along the western and southern border of Cuyahoga County. Retaining these five districts with their 1981 boundaries does not in any way prevent one from reconfiguring the remainder of Cuyahoga County.

17. The plan of apportionment submitted to the Apportionment Board on February 18 by the minority members retains these five house districts (6, 7, 10, 13, 17) intact with their 1981 boundaries and meets the requirements of the Ohio Constitution with regard to the districts in Cuyahoga County. Thus, the defendants violated Article XI, Section 7(D) five times in Cuyahoga County when there was no need to do so.

18. In Montgomery County. Defendants show on page 16 that they are aware that two of the five house districts created in 1981 and wholly contained within Montgomery County (H.D. 37 and H.D. 39) meet the population requirements of Article XI, Section 3. They further state on page 17 that these districts ". . . cannot be retained intact because of the population requirements of the other districts." Board Finding, p. 16. They are only half right.

19. Districts 37 and 38 combined span the entire breadth of Montgomery County from East to West. House Districts 36 and 38 are south of House Districts 37 and 39. Both House District 36 and House District 38 are above the maximum allowable population specified in Article XI, Section 3 and must lose population to another house district in Montgomery Country. But because of their geographic configuration House Districts 36 and 38 can only lose population to *either* House District 37 or

House District 39 (see attached map B). Thus, in drawing the 1991 plan of apportionment for Montgomery County, one much change *either* House District 37 *or* House District 39, but one need *not* change both of them.

20. The plan of apportionment submitted to the Apportionment Board on February 18, 1992, by the minority members retains House District 39 intact with its 1981 boundaries. Thus, the defendants violated Article XI, Section 7(D) in Montgomery County.

21. In Summit County, Defendants show on page 16 and on page 17 that they were aware that all four of the house districts (H.D.s 41, 42, 43, 44) wholly contained within Summit County meet the requirements of Article XI, Section 3. Yet they reconfigure all of these districts. Board Findings, p. 16. They give as their reason "to avoid splitting the black community in Summit County and to avoid minority voter dilution." No provision of the Ohio Constitution is cited for this reconfiguration.

22. The plan of apportionment submitted to the Apportionment Board on February 18, 1992, by the minority members maintains all four of these districts as they were in the 1981 plan. This is done without affecting any other districts in the state. Thus, the Defendants violated Article XI, Section 7(D) four times in Summit County.

23. In Hamilton County, the Defendants show on page 15 that they are aware that House District 22 (1981) meets the population requirements of Article XI, Section 3. Board Findings, p. 15. However, they further state on page 17 that "The remaining district (H.D. 22) cannot be retained intact because of the population requirements of the others districts." Board Findings, 53(b). That is not true.

24. The population of Hamilton County is very nearly equal to eight house of representative ratios. Hence, eight districts can be created wholly within Hamilton County. The population of H.D. 22 is only slightly below a house

of representatives ratio. This district can be retained without adversely affecting the other seven districts in Hamilton County. It is in the northwest part of the county and does not in any way restrict the reconfiguring of the remaining seven districts. Thus, the Defendants violated Article XI, Section 7(D) in Hamilton County.

25. The plan of apportionment submitted to the Apportionment Board on February 18, 1992, by the minority members does retain House District 22 intact with its 1981 boundaries and meets the requirements of the Ohio Constitution with regard to the house districts wholly within Hamilton County.

26. In Franklin County, Defendants show on page 16 that they were aware that two of the eight house districts created in 1981 (29 and 32) meet the population requirements of Article XI, Section 3. But on page 17 they state that these two districts ". . . cannot be retained intact because of the population requirements of the other districts." Board Findings, 53(d). That is not true.

27. The plan of apportionment submitted to the Apportionment Board on February 18, 1992 by the minority members does maintain House Districts 29 and 32 intact as they were in the 1981 plan, and meets the requirements of the Ohio Constitution with regard to the eight house districts wholly within Franklin County. Thus, the Defendants violated Article XI, Section 7(D) twice in Franklin County when there was no need to do so.

28. In Lucas County, Defendants show on page 16 that the populations of house districts 45 and 46 meet the requirements of Article XI, Section 3. The Defendants further state on page 18 that these two districts ". . . cannot be retained intact because of population requirements of other districts and to avoid minority voter dilution." Board Finding, 53(f).

29. The plan of apportionment submitted to the Apportionment Board on February 18, 1992 by the minority

members does maintain House Districts 45 and 46 as they were in the 1981 plan and meets the requirements of the Ohio Constitution with regard to the house districts wholly in Lucas County. The population of 1981 House District 47 is too low while the population of 1981 House District 48 is too high. By moving the appropriate population from H.D. 48 to H.D. 47 the populations can be balanced in accordance with the Ohio Constitution without affecting any other districts in the state. Hence, the Defendants are in error when they say that House Districts 45 and 46 cannot be retained because of population requirements. The Defendants violated Article XI, Section 7(D) twice in Lucas County when there was no need to do so.

III. THE DEFENDANTS 1992 PLAN VIOLATES SECTION 7(A) OF APTICLE XI

30. The Defendants have clearly misread Article XI of the Ohio Constitution with regard to the creation of whole county districts. On page 103 they cite Section 7(A) of Article XI which says in part ". . . the boundary line of districts shall be so drawn [*i.e.*, districts shall be created] as to delineate an area containing *one or more whole counties*." Board Finding, 242 (emphasis in original).

31. Note that Article XI, 7(A) refers to one or *more* whole counties. They further go on to say that . . . the creation of 'whole country districts is governed by Article XI, Sections 10(A) and 10(B)'" (page 104).

32. The Defendants assert the primacy of Section 10 of Article XI over Section 7 of Article XI. Yet the first paragraph of Section 10 states:

> "The standards prescribed in sections 3, 7, 8 and 9 of this Article shall govern the establishment of house of representative districts, which shall be created and numbered in the following order to the extent

that such order is consistent with the foregoing stands."

33. Clearly based on the wording of Article XI Section 10, it is subservient to the provisions of Section 3, 7, 8 and 9. Section 10 only sets out the order in which house districts are to be created. But even that ordering is conditional. In the words of Section 10, it is conditional ". . . to the extent that such order is consistent with the foregoing standards" (*i.e.*, Section, 3, 7, 8 and 9). In other words Section 10 states that you may change the order in which you create the districts if such a change more consistently meets the standards of Section 3, such a change more consistently meets the standards of Section 3, 7, 8 and 9.

34. Neither 10(A) or 10(B) of Article XI speak to districts that are *two or more* whole counties, as Section 7(A) does. Article XI, Section 7 clearly sets the standard and governs the creation of both *single* and *multiple* whole county districts.

35. What then is the purpose of Article XI, Section 10? Section 10 exists because the framers of Article XI were aware of the fundamentals of geography. To use an analogy they realized that drawing districts was like painting the floor of a room. If you were not careful you could paint yourself into a corner you could not get out of.

36. Let us start with Paragraphs (C) and (D) of Article XI, Section 10. Paragraph (C) says to create the house districts in the most populous counties before going on to those with less population. Suppose this procedure were reversed and (D) came before (C). Then it would be possible to combine all of the territory surrounding an urban county into districts before creating districts within that urban county. If the population of that urban county was not approximately equal to a whole number of districts, then there would be a fraction

of a district in the large urban county that could not be attached to any other territory. In effect, if paragraph (D) came before (C) you could indeed paint yourself into a corner.

37. Paragraphs 10(A) and 10(B) of Article XI give primacy to districts that are exactly *one* whole county. The drafters did not intend those counties used to fill out any remaining population when a large county has a fraction of a district left over and needs to add an adjoining territory from a adjoining county.

IV. THE SPLITTING OF LINCOLN HEIGHTS IN HAMILTON COUNTY

38. Lincoln Heights is a suburb in Hamilton County. It has a total population of 4,805. Lincoln Heights has a non-hispanic black population of 4,746 and is 98.77% black. In the plan of apportionment passed on Octiber 3, 1991, it was in House District 32 which was 23.90% black. District 36 was 4.47% black in the 1991 October plan adopted by the Board. In amendment "D" as passed by the Apportionment Board on February 18, 1992, Lincoln Heights was moved from the 32nd House District to the 36th House District. The black population percentages for these districts under the 1992 Board plan are 24.29% for House District 32 and 9.22% for House District 36.

V. THE EFFECT OF THE 1992 BOARD PLAN ON THE OHIO POPULATION

39. Total Population moved from one house district to another by Amendment "D" as passed by the Apportionment Board on February 18, 1992 is 554,291 people.

40. Total Non-Hispanic Black Population moved from one house district to another by Amendment "D" as passed by the Apportionment Board on February 18, 1992 is 95,423 people.

I hereby declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge and belief.

/s/ Robert R. Dykes
ROBERT R. DYKES

Dated: March 5, 1992

* * * *

[Exhibit 2 to Brief of Plaintiffs in Response to the February 19, 1992 Filing of Defendants: filed March 6, 1992]

COMPARISON OF MINORITY HOUSE DISTRICTS IN 1981 DEMOCRAT PLAN, 7D PLAN, 1991 MAJORITY, AND 1991 MAJORITY AMENDMENT "D"

1981 PLAN DEMOCRAT		7D PLAN		1991 MAJORITY PLAN			1991 MAJORITY AMENDMENT "D"		
6-19 Cuyahoga		6-18 Cuyahoga [1]		8-20 Cuyahoga			8-20 Cuyahoga		
16—	94.67% [1]	16—	70.1%	10—	63.42% [2]	67.35% [1]	10—	63.42% [2]	67.35% [1]
14—	90.05%	14—	65.6%	12—	65.13%	67.25%	12—	65.13%	67.25%
12—	74.80%	12—	64.3%	8—	61.41%	65.64%	8—	61.41%	65.64%
15—	34.80%	11—	55.6%	9—	58.36%	62.30%	9—	58.36%	62.30%
*17—	26.14%	17—	26.0%	11—	40.61%	43.01%	11—	40.61%	43.01%
18—	14.70%	15—	19.1%	14—	6.86%	7.92%	14—	6.86%	7.92%
19—	14.40%	18—	11.1%	19—	3.71%	4.63%	19—	3.71%	4.63%
*13—	4.99%	13—	5.0%	15—	3.25%	3.29%	15—	3.25%	3.29%
11—	4.44%	9—	3.7%	17—	2.34%	2.85%	17—	2.34%	2.85%
9—	4.16%	7—	2.4%	13—	2.32%	2.75%	13—	2.32%	2.75%
* 7—	2.36%	8—	2.3%	18—	1.31%	1.41%	18—	1.31%	1.41%
8—	2.12%	10—	.6%	16—	0.45%	0.47%	16—	0.45%	0.47%
*10—	0.64%	6—	.5%	20—	0.23%	0.31%	20—	0.23%	0.31%
* 6—	0.49%								

[1] Black percentage of total population

[2] Black Voting Age Population

* Meets Population Requirements

1981 DEMOCRAT PLAN		7D PLAN		1991 MAJORITY PLAN			1991 MAJORITY AMENDMENT "D"	
28-35 Franklin		19-26 Franklin		21-29 Franklin			21-29 Franklin	
31—	46.80%	21—	46.2%	21—	50.30%	55.92%	21—	48.3% 54.3%
*29—	38.50%	19—	38.5%	22—	44.31%	48.29%	22—	40.98% 44.68%
*32—	26.60%	22—	26.6%	26—	8.07%	8.66%	26—	8.07% 8.66%
30—	12.40%	20—	11.2%	25—	7.96%	8.41%	25—	7.96% 8.41%
28—	5.90%	26—	6.2%	23—	7.78%	8.32%	23—	8.95% 9.79%
34—	5.10%	24—	4.8%	29—	4.47%	4.32%	29—	4.47% 4.32%
33—	4.10%	23—	4.3%	24—	3.92%	4.22%	24—	3.92% 4.22%
35—	1.40%	25—	2.3%	28—	3.56%	3.75%	28—	3.56% 3.75%
				27—	3.09%	3.57%	27—	3.09% 3.57%
20-27 Hamilton		27-34 Hamilton		30-37 Hamilton			30-37 Hamilton	
25—	53.20%	28—	60.9%	30—	56.83%	61.07%	30—	52.72% 55.98%
23—	45.90%	33—	47.1%	31—	52.60%	59.82%	31—	43.13% 49.16%
24—	32.30%	34—	26.4%	32—	21.58%	24.00%	32—	20.76% 24.41%
22—	12.60%	31—	13.7%	35—	7.91%	8.96%	35—	8.97% 10.14%
27—	12.20%	32—	12.6%	33—	7.50%	8.04%	33—	11.84% 15.38%
20—	8.90%	27—	3.6%	36—	4.08%	4.49%	36—	4.08% 4.49%
21—	7.50%	30—	2.7%	37—	1.94%	2.14%	37—	1.94% 2.14%
26—	2.70%	29—	2.5%	34—	1.90%	2.14%	34—	1.90% 2.14%
36-40 Montgomery		35-39 Montgomery		38-43 Montgomery			38-43 Montgomery	
36—	42.10%	36—	43.7%	38—	50.70%	54.78%	38—	40.1% 43.50%
*37—	36.10%	37—	40.0%	39—	29.23%	32.35%	39—	38.28% 41.69%
40—	6.20%	39—	4.7%	43—	3.61%	3.86%	43—	3.61% 3.86%

*39—	4.70%	35—	2.5%	40—	2.84%	3.30%	40— 2.84% 3.30%
38—	0.91%	38—	.9%	42—	2.28%	2.76%	42— 2.28% 2.76%
				41—	1.18%	1.31%	41— 1.18% 1.31%
41-44 Summit		40-43 Summit		44-48 Summit			44-48 Summit
*42—	35.40%	42—	35.2%	44—	39.52%	43.26%	44— 39.86% 43.07%
*44—	9.00%	40—	9.0%	45—	5.40%	6.29%	45— 5.40% 6.29%
*43—	2.90%	43—	2.9%	47—	5.00%	6.00%	47— 5.00% 6.00%
*41—	2.30%	41—	2.3%	46—	1.12%	1.33%	46— 1.12% 1.33%
				48—	0.61%	0.53%	48— 0.61% 0.53%
45-48 Lucas		44-47 Lucas		49-52 Lucas			49-52 Lucas
*45—	41.70%	45—	41.70%	49—	47.65%	50.92%	49— 46.42% 49.9%
47—	13.20%	47—	12.3%	52—	4.85%	5.65%	52— 4.85% 5.65%
*46—	5.30%	46—	5.3%	50—	4.23%	5.46%	50— 4.23% 5.46%
48—	2.80%	44—	2.8%	51—	2.18%	2.40%	51— 2.18% 2.40%
49-51 Stark				54-57 Stark			54-57 Stark
50—	14.90%			54—	12.93%	15.15%	54— 12.93% 15.15%
49—	4.43%			55—	3.39%	3.84%	55— 3.39% 3.84%
51—	1.30%			57—	2.64%	2.98%	57— 2.64% 2.98%
				56—	1.15%	1.20%	56— 1.15% 1.20%
52-53 Mahoning				64-65 Mahoning			64-65 Mahoning
53—	27.80%			64—	31.19%	35.53%	64— 31.19% 35.53%
52—	10.50%			65—	1.48%	1.64%	65— 1.48% 1.64%

Total (Minority Districts Over 10%)		
24	16	16
Total (Minority-Majority (Over 50%))		
4	8	9

[Exhibit 3 to Brief of Plaintiffs in Response to the February 19, 1992 Filing of Defendants: filed March 6, 1992]

CHART 1

SUMMARY CHART SHOWING PACKING OF DISTRICTS OF MINORITY REPRESENTATIVES ELECTED WITH HIGH CROSSOVER VOTING

District [5]	Minority Rep. (Terms)[5]	White Crossover Vote (%) from Democrats (D)[4] and Republicans (R)	Winning Candidates' [3] % of Vote (1990)	Winning Candidates' [1] Avg. % of Vote For Contests 1984-88	Black Population % [2] 1981 Plan	1991 Plan	% Change
12	T. James(13)	63.71(D)	86.69	88.89	74.8	67.0	−7.8
14	C. Prentiss(1)	51.65(D)	88.61	N/A	90.1	65.4	−24.5
16	V. Whalen(4)	67.55(D)	92.82	100	94.6	67.0	−27.6
23	W. Mallory(13)	50.66(D)	70.47	69.65	45.9	59.6	+13.8
25	H. Rankin(8)	50.93(D)	73.37	71.00	53.2	60.9	+7.7
29	R. Miller(6)	44.50(D)	67.91	68.27	38.5	48.0[6]	+9.5
31	O. Beatty(7)	50.25(D)	71.55	71.27	46.8	55.7[6]	+8.9
36	R. McLin(2)	35.44(D)	64.88	66.80	42.1	54.6	+12.5
37	T. Roberts(4)	45.98(D)	64.48	63.94	36.1	32.2	−3.9
42	V. Sykes(5)	48.76(D)	65.49	67.52	35.2	43.0	+7.6
45	C. Jones(12)	44.46(D)	67.12	72.64	41.7	50.6	+8.3

[1] Base information taken from Henderson Deposition Exhibit 4. Average percentage of vote for winning candidates calculated by dividing the sum of winning vote percentage by the number successful contests for the named representative (*e.g.*, T. James: ((1988 - 88.86) + (1986 - 89.27) + (1984 - 88.54)) divided by 3).

[2] Information taken from Dykes Deposition Exhibit 20, p. 3.

[3] Information taken from Henderson Deposition Exhibit 4.

[4] Information taken from Henderson Deposition Exhibit 3 ("Voting in the 1990 General Election for House Candidates in the 11 Districts Represented by Blacks.")

[5] Information taken from Henderson Deposition Exhibit 5.

[6] Dykes Deposition Exhibit 20, p. 3 transposes the 1991 percentage black electorate for Representatives Miller and Beatty. The transportation is corrected on this chart.

[Exhibit 1 (part) to Brief of Plaintiffs in Response to the February 19, 1992 Filing of Defendants: filed March 6, 1992]

AFFIDAVIT OF GORDON G. HENDERSON

STATE OF INDIANA
COUNTY OF WAYNE

I

I am the same Gordon G. Henderson residing at 220 South 19th Street in Richmond, Indiana, who has previously prepared affidavits for this cause and who testified at the hearing in Cincinnati in January, 1992. An up-to-date curriculum vitae accompanies this affidavit. See Appendix A attached.

II

Henderson position on creating majority-minority districts

Defendants' findings of fact (#83, page 32) states: "Mr. Henderson's position is that an apportioning body must create majority-minority districts whenever possible . . . ." I have not taken that position in this cause. Indeed, I have never taken that position in any of the voting rights cases in which I have participated. To the contrary, my position has consistently been that in deciding what percent a minority population must be in a particular district in order for that minority population to have an opportunity to elect representatives of its choice, one must look at one or more of the following: (A) The extent to which voting in the jurisdiction is racially polarized; (B) the extent to which the minority population is cohesive in voting; (C) the extent to which candidates of choice of minority voters are supported by voters who are in the racial/ethnic majority; and when appropriate (D) the general level of registration evident among minority persons; and (E) the general level of turnout evident

among minority voters. I subscribe to the Brace-Grofman-Handley-Niemi proposition that the percent which minority persons/voters must be within a district is case specific, that sometimes data such as that I have just identified when examined will indicate that the percent should be above fifty but that sometimes that data will indicate that the percent should be well below fifty. See Kimball Brace, Bernard Grofman, Lisa Handley and Richard Niemi, "Minority Voting Equality: The 65 Percent Rule in Theory and Practice," Law and Policy, Vol. 10, No. 1, January, 1988, 43-62. Further I have stated my concurrence with the Brace-Grofman-Handley-Niemi proposition in numerous voting rights cases. Never once have I stated as a universal rule that those who draw redistricting plans must create majority-minority districts whenever possible.

III.

Gary King's unique definition of racially polarized voting

Gary King has worked up his own definition of racially polarized voting. Not only is it unique to him; it is also self-serving.

He first defined it at the time he gave a deposition on December 13, 1991. In response to the question "What is racial bloc or racial polarized voting?" here is how he defined racially polarized voting as reported at the top of page 40 of the transcript of that deposition:

> A. It is what happens at the end of the individual level, voter level, if black voters vote for certain candidates more frequently than white voters do. And we would call that racially polarized voting.

At the top of page 41 he clarified the definition saying:

> A. The third column is what is central here, and that is *the proportion of blacks who vote for Democrats minus the proportion of whites who vote for Democrats. If this is a positive number then there*

is some degree of racially polarized voting. (Underlining added.)

Therefore: If 99% of blacks vote for the Democratic candidate Jones, and 98% of whites vote for the same Democratic candidate Jones, since 99 minus 98 yields a positive number this is evidence of some degree of racially polarized voting.

It requires no more than common sense to realize that to so define racially polarized voting is absurd.

Under this definition, the only election in which one would not find racially polarized voting would be an election in which precisely identical percentages of every racial ethnic subpopulation voted for the Democratic candidate. If one were to accept this definition of racially polarized voting, it is possible that the only election in this country in which one would not find racially polarized voting would be an election held in a jurisdiction in which all persons voters were of the same race or ethnicity.

Defendants assert that King analyzed 200 Ohio elections and found racially polarized voting in every one of them. Had he analyzed 10,200 Ohio elections, given his definition, King would probably have found racially polarized voting in every one of the other ten thousand too.

But does the transcript of his deposition accurately reflect King's definition? It does.

On pages 69, 70 and 71, he once again repeated his belief that racial bloc voting exists whenever a different proportion of whites than blacks vote for a Democratic candidate. Excerpts from the three pages follow:

[Page 69.] I wanted to figure out the proportion of blacks voting for Democrats minus the proportion of whites voting for democrats. And that is the percentage presented here.

[Page 69]. One can see very clearly the proportion of whites voting for Democrats is less than the

> proportion of blacks voting for Democrats in every single district I analyzed.

Since *any* difference in the proportion of whites and blacks voting for the Democratic candidate is evidence, according to King's definition, of racial bloc voting, can anyone be surprised that King discovered evidence of racial bloc voting in every election he analyzed? Can anyone seriously doubt that one will rarely if ever find an election anywhere in this country where the exact same proportion of blacks and whites are voting for the same candidate? Yet, unless the exact same proportion of blacks and whites vote for the same candidate, then that is evidence of racial bloc voting according to King, even if a solid majority of whites and blacks are voting for the same candidate and even if that candidate wins in a landslide.

> [Page 71]. Counsel asked for racially polarized voting and this is what I took it to mean precisely. Blacks are voting for Democrats more than whites are voting for Democrats. So blacks prefer different candidates than whites do. It happens in every case here.

In the statement he delivered at the time of his appearance before the Reapportionment Board on February 11, King repeated his definition, saying at page 48 of the transcript made of his statement:

> The column labeled whites is an estimate of the proportion of whites who vote for the black Democratic incumbent in state House races averaged over all of the incumbents. And as you can see, in 1984, that's 56.76 percent. In the same year, the average over the same districts, the proportion of support for the black incumbent candidates among black citizens is about 95 percent. The differences between those figures is racial bloc voting.

IV

The Grofman/Thornburg definition of racially polarized voting

I am generally familiar with the work, the analyses and the testimony of the following academicians and practitioners who have testified on behalf of plaintiffs and defendants in literally hundreds of voting rights cases: Doctors Robert Brischetto, Richard Engstrom, Bernard Grofman, Jerry Himelstein, Morgan Kousser, Allan Lichtman, James Loewen, Harold Stanley, and Genie Stowers, and Messrs. Kimball Brace and Thomas Hoefflller. None of them uses a definition of racially polarized voting that even remotely resembles that used by King. Their definition instead is that used by Bernard Grofman, plaintiff's expert in *Gingles v. Edmisten*, and approved by the U.S. Supreme Court in *Thornburg v. Gingles*.

That definition finds evidence of racially polarized voting only when a majority (or the greatest number) of white votes against the candidate of choice of a majority (or the greatest number) of blacks so as to defeat the candidate of choice of black voters.

An election in which a majority of whites voted for a black candidate of choice along with a majority of blacks would qualify under the Grofman/Thornburg definition as the very opposite of racially polarized voting.

In "The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective," in *Law & Policy*, Vol. 7, No. 2, April, 1985, Grofman whites (page 207):

> We propose to define *racial polarization* as being *substantively significant* if it is of sufficient magnitude that the racial composition of the electorate can affect the candidate(s) chosen, a definition that was accepted by the trial court in *Gingles*. Thus, for example, in a two-candidate race if 80% of black

voters vote for candidate A and 55% of white votes also do so, this would not be counted as substantively significant racial polarization as we have defined that term, because voters of both races would choose the same candidate. [Emphasis in original]

V

Henderson Thornburg-style analyses of 1986, 1988 and 1990 House of Representatives elections

I have done a bivariate regression and homogeneous precinct analysis for elections to seats in the Ohio House of Representatives in those six districts which elected the candidates of choice of Black voters in the 1986 and 1988 general elections and in which there were two candidates. The procedure I used is identical in every detail to that used by Bernard Grofman, plaintiff's expert witness in *Gingles* v. *Edmisten*, whose work was accepted by the District Court and by the U.S. Supreme Court as well as may be seen from a reading of that court's opinion in *Thornburg* v. *Gingles*. The results of those analyses follow:

	% of Votes Cast by White Voters for Candidate or Choice of Black Voters		% of Votes Cast by Black Voters for Candidate of Choice of Black Voters	
	Bivariate Regression Analysis	Homogenous Precinct Analysis	Bivariate Regression Analysis	Homogenous Precinct Analysis
1986:				
District 12	66.06	NA	95.65	05.59
District 23	45.73	NA	100.06[1]	95.31
District 29	47.11	NA	103.47	96.39
District 31	50.61	NA	98.92	95.11
District 42	44.63	NA	108.41	95.57
District 45	60.86	NA	93.58	90.82
1988:				
District 12	63.91	NA	95.67	95.67
District 23	43.08	NA	102.64	96.29
District 29	45.75	NA	105.00	97.12
District 31	53.34	NA	100.20	97.35
District 42	39.63	NA	111.05	95.70
District 45	57.17	NA	97.49	95.42

[1] Bivariate regression will generate estimates of the percentage of the vote received by a candidate that are greater than 100 whenever turnout by African-American voters is markedly greater than turnout by whites, or vice-versa. This is not considered a problem by those who use bivariate regression to analyze racially polarized voting. *See*, Bernard Grofman and James Loewen, "Recent Developments in Methods Used in Vote Dilution Litigation," *The Urban Lawyer*, Vol. 21, No. 3 (Summer, 1989), pp. 589-604.

By King's definition every one of these elections would be evidence of racially polarized voting since different proportions of blacks and whites are voting for the same candidates.

By the Grofman/Thornburg definition, not one of these elections would be evidence of racially polarized voting since even when a majority of white voters voted against

the candidate of choice of black voters, the candidates of choice of black voters still won.

I have also done an analysis of voting in the 1990 general election for seats in the Ohio House of Representatives for those eleven districts represented by African-American persons with the following results;

Voting in the 1990 General Election
for House Candidates in the 11 Districts
Represented by Blacks

Party of Candidates	Total Vote	in Black Precincts	from Black Voters	in White Precincts	from White Voters
District 12	13644				
Democrat	11969	94.41	94.79	66.66	63.71
Republican	1675	5.59	5.21	33.33	36.29
Turnout: 20.80% White					
25.87% Black					
District 14	17959				
Democrat	16830	96.65	97.83	57.55	51.65
Republican	1129	3.35	2.17	42.45	48.35
Turnout: 22.51% White					
28.33% Black					
District 16	23153				
Democrat	21584	93.87	94.36	68.34	67.55
Republican	1569	6.13	5.64	31.66	32.45
Turnout: 26.11% White					
34.30% Black					
District 23	20135				
Democrat	14190	94.70	101.09	57.23	50.66
Republican	5945	5.30	−1.09	42.77	49.34
Turnout: 28.23% White					
12.63% Black					
District 25	20381				
Democrat	21556	94.55	98.83	50.93	50.93
Republican	7825	5.45	1.17	49.07	49.07
Turnout: 41.02% White					
36.10% Black					

Party of Candidates		Total Vote	in Black Pre-cincts	from Black Voters	in White Pre-cincts	from White Voters
District 29		22985				
Democrat		15683	94.24	103.42	51.00	44.50
Republican		7302	5.76	−3.42	49.00	55.50
Turnout:	28.16%	White				
	34.36%	Black				
District 31		23084				
Democrat		16635	95.46	102.17	53.08	50.25
Republican		6449	4.54	−2.17	46.92	49.75
Turnout:	33.05%	White				
	31.30%	Black				
District 36		28162				
Democrat		181129	97.69	101.35	36.57	35.44
Republican		10033	2.31	−1.35	63.43	64.56
Turnout:	31.13%	White				
	36.33%	Black				
District 37		23835				
Democrat		15406	94.55	101.39	47.70	45.98
Republican		8429	5.45	−1.39	52.30	54.02
Turnout:	29.26%	White				
	30.05%	Black				
District 42		29381				
Democrat		19238	95.69	109.63	48.79	48.76
Republican		10143	4.31	−9.63	51.21	51.24
Turnout:	40.22%	White				
	31.38%	Black				
District 45		21501				
Democrat		15536	92.78	97.62	45.41	44.46
Republican		5965	7.22	2.39	44.59	45.54
Turnout:	26.60%	White				
	29.53%	Black				

By King's definition every one of these elections would be evidence of racially polarized voting since different proportions of blacks and whites are voting for the same candidates.

By the Grofman/Thornburg definition, not one of these elections would be evidence of racially polarized voting since even when a majority of white voters voted against the candidate of choice of black voters, the candidates of choice of black voters still won.

VI

Defendants say that King performed a bivariate ecological regression analyses [*sic*] and determined that all the data indicated significant racially polarized voting. That is absurd. Not only does King use a definition of racially polarized voting that is substantially different from the rest of the profession, he does not use the standard regression procedure which received the imprimatur of the U.S. Supreme Court in its *Thornburg* opinion i.e. the two-equation method used by Bernard Grofman, plaintiffs expert in *Gingles* v. *Edmisten*, the same two-equation method I have used whenever I have been called upon to do an analysis of racially polarized voting including for this cause. There is no reason for King not to have used procedures and definitions identical to those used by Grofman for his analysis for *Gingles* except that had he done so King would necessarily have concluded, as I have, that far from finding extensive evidence of racial bloc voting in Ohio elections, one finds instead extensive evidence of the very opposite of racially polarized voting namely coalitional voting, voting in which a majority/plurality of the minority racial/ethnic group and a majority/plurality of the majority racial/ethnic group vote for the same candidate and that candidate wins.

Further, in using his single-equation method instead of the preferred two-equation method, King either is ignorant of or chooses to ignore well-known criticisms of

the single-equation method, criticisms that led Grofman in the *Gingles* to write ". . . it is best not to use this form of regression." See page 61 of Bernard Grofman, "An Outline for Racial Bloc Voting Analysis," a document prepared as an exhibit in *Gingles* v. *Edmisten* to explain the proper procedures to use to analyze racial bloc voting. This document is 71 pages long. Not to burden the court with such a lengthy document, I have xeroxed the cover page, the table of contents, and the three-page appendix in which the quotation from Grofman appears. See Appendix B attached. Grofman has since repeated his criticism of the single equation method in an article jointly authorized with James Loewen entitled "Recent Developments in Methods Used in Vote Dilution Litigation," *The Urban Lawyer*, Vol. 21, No. 3 (summer, 1989), pp. 589-604.

Were it not for his most peculiar choice of defintion for racially polarized voting, King would have arrived at a firm conclusion that elections in recent years in Ohio have exhibited clear evidence of coalitional voting. The results of King's analyses are presented in summary form in paragraph 167, pages 69-70 of defendants' findings of facts. Here is what that summary statement reports:

Average Proportion Voting For Black Incumbent State House Candidates Among

	Whites	Blacks
1984	56.76%	95.19%
1986	60.22%	95.48%
1988	67.88%	98.46%
1990	61.53%	95.69%

That summary shows that substantial majorities of both Whites and African-Americans voted for the same state house candidates in the years 1984, 1986, 1988 and 1990. King calls that racial bloc voting. It isn't.

VII

King's Seats-Votes Analysis

Gary King performed seats-votes analyses and concluded that the proposed Republican plans of 1991 and 1992 are fair. Even if that were true, that fact alone could never excuse or justify racial gerrymandering.

A seats-votes analysis can help determine whether the number of seats in a legislative body held by each political party fairly reflects the strength of support enjoyed by each political party in the electorate, or whether instead the number of seats in a legislative body held by one of the political parties seriously distorts the strength of support enjoyed by that party in the electorate.

It is readily conceivable that a seats votes analysis might show that the proportion of seats held by one political party in a legislative body reflected very closely that party's support within the electorate. Yet that same plan might reveal a flagrant racial gerrymandering.

Indeed a plan might be drawn which would meet all relevant standards for judging a plan—including the principles of one person one vote, compactness and contiguity—and pass muster under a seats votes analysis, and still constitute a flagrant racial gerrymander.

How could that be? Districts with populations very close to if not exactly at the norm or ideal population of a district, districts perfectly square in shape, districts whose boundaries might be drawn with a single unbroken line, could be drawn in the midst of the African-American population concentrations in the urban areas in which African-Americans were more than ninety percent of the population. And even if a seats votes analysis indicated that the proportion of seats held by each political party in the legislative body fairly reflected each party's strength in the electorate, that packing of African-American voting strength would still constitute clearcut evidence of a racial gerrymander.

Similarly compact, contiguous districts with populations very close to if not at the norm could be drawn that severely cracked or fragmented African-American population concentrations in the urban areas. And again a seats votes analysis might well indicate that the strength of each political party as reflected in the proportion of seats held by each in the legislature closely mirrored the strength of each within the electorate, but one would still have to conclude that fragmenting African-American voting strength in the urban areas was evidence that the plan created a racial gerrymander.

A seats votes analysis, in short, by itself can never indicate whether a plan includes districts that either pack or crack minority voting strength. A seats votes analysis is largely irrelevant to the question of whether or not a redistricting plan does or does not include racial gerrymanders, or does nor does not violate the Voting Rights Act.

VIII

The Egregious Racial Gerrymandering in Franklin County

The 1992 Republican Plan took eight districts in Franklin County in the 1981 plan—numbers 28, 29, 30, 31, 32, 33, 34 and 35—and distributed the populations of those eight districts among nine districts—numbers 21, 22, 23, 24, 25, 26, 27, 28 and 29.

In four of the eight districts in the 1981 plan African-Americans were more than ten percent of the population. In fact the percent of the population that was African-American in these districts was 12.42, 26.61, 38.49 and 46.79. All four districts voted for the Democratic candidate for the state House of Representatives in 1990. The Democratic candidate also carried district 33, in which African-Americans were 4.12% of the population. Analysis indicates that the candidate who won was the candidate of choice of African-American voters in all five districts.

In the 1992 Republican plan, only two of the nine districts have populations of which more than ten percent of the population is African-American. African-Americans are 44.45% and 54.05% of the populations of districts 21 and 22. And an examination of the results of the 1990 elections to the state House of Representatives in the nine new districts indicates the Democratic candidate would carry only three of the nine districts.

In short, the 1992 Republican Plan takes eight districts in the 1981 plan in four of which there were substantial numbers of African-Americans and five of which were carried handily by the Democratic candidate in the 1990 election for the state House of Representatives, and distributes the populations of these five districts across nine new districts in only two of which may be found substantial number of African-Americans and in only three of which does the Democratic candidate in the 1990 election to the state House of Representatives win.

In the process, African-American persons numbering 16769 who were in five of the eight districts in the 1981 plan which elected the candidate of choice of African-American voters have been dispersed among six of the new districts. In these six districts the African-American percent of the population is 3.32, 3.78, 3.94, 4.78, 7.96, and 9.24. In these six districts the percent of the vote received by the Democratic candidate for the state House of Representatives in 1990 was 33.65, 34.50, 38.16, 39.35, 41.10 and 41.25%. In short, this African-American population concentration of 16769 persons has been fractured. Under the 1981 plan they were able to elect the candidate of their choice. Under the 1992 Republican plan they cannot.

It is clear that in creating districts 21 and 22 in the 1992 Republican plan, more African-American voters were included in those districts than are needed to elect the candidate of choice of African-American voters and it is clear, therefore, that some of the African-American voters

included in the populations of districts 21 and 22 could have been joined with the African-American population concentration of 16769 persons dispersed among districts 24 through 29 to make at least one more district in which African-Americans could elect the candidate of their choice.

But are the 16769 African-American persons by themselves sufficient to elect their candiate of choice even if a district is made in which the total African-American population consists of only those 16769 persons?

The answer is yes.

16769 persons is equal to 15.30% of the norm—the population of a district with the ideal population of 108606 persons.

Eleven districts in the 1981 plan had populations of which African-Americans were at or near this percentage. They are listed below and for each of them the African-American percent of the district population and the percent of the vote received by the Democratic candidate for the Ohio house in 1990 are reported.

District Number	% of population African-American	% of Vote for winning House candidate 1990
1	11.15	31.58
18	14.72	74.61
19	14.36	58.27
22	12.62	43.11
27	12.64	34.25
30	12.42	71.04
47	13.23	76.06
50	14.88	58.47
52	10.48	79.64
59	12.82	76.31
62	11.35	53.52

As the litsing above shows, in the 1990 election to the state House of Representatives, the candidate of choice of African-American voters carried eight of the eleven districts. In the face of that evidence it seems quite reasonable to conclude that a district which included all of the 16769 African-American persons who are distributed among six districts in the 1992 Republican Plan would offer those 16769 African-American persons a reasonable opportunity to elect the candidate of their choice.

Therefore, to deny them that opportunity by dispersing their voting strength among six districts constitutes retrogression pure and simple, because they did have a chance before to elect the candidate of their choice, they did in fact elect the candidate of their choice, a district could have been drawn in which they would still have the opportunity to elect the candidate of their choice, but instead their voting strength has been fragmented and made worthless by being distrubuted among six different districts under the 1992 Republican plan.

How different is the 1992 plan from the 1991 plan? The difference is slight indeed. Under the 1991 plan 17740 African-American persons were moved out of districts in which they had been able to elect representatives of their choice into districts in which they could not. The figure for the 1992 plan, as noted already, is 16769. So the 1992 plan treats a total of 971 African-American persons more fairly than did the 1991 plan.

In summary: Packing of African-American persons has been employed in drawing districts 21 and 22 of the 1992 Republican plan, and cracking of African-American persons has been employed in drawing the remaining seven districts, most particularly six of the seven districts, districts 24 through 29 in the 1992 Republican plan. The result is retrogression of African-American voting strength, because under the 1992 Republican plan African-Americans are able to elect representatives of their choice in

fewer districts than they did in the 1981 plan, and further at least four districts might have been drawn in which African-Americans would have a reasonable opportunity to elect representatives of their choice.

Hamilton County: The "Effects" of the 1992 Plan are Substantially the Same as the 1991 Plan

In Hamilton County 46% and 53% black population districts were converted to 49% and 56% districts in the 1992 plan with the result that three majority Democratic districts would become two majority Democratic districts and with the further result that black voters are deprived of the opportunity to elect a representative of their choice not only in one of the three majority districts but also in the influence district which has disappeared.

IX

How Miniscule are the Differences Between the 1991 and 1992 Republican Plans: The Districts of Lucas County as a Case In Point

Here follows a listing which shows the percent of the population that is African-American and the share of the vote won by the Democratic candidate for the Ohio House of Representatives in 1990 for the districts in the 1991 and 1992 Republican Plans.[2]

[2] In Lucas County a 42% 1981 black population district was made into a 50% district. That district was 72% Democratic under the 1981 plan; it is now 83% percent Democratic. Similarly, in Summit County, a 35% black population district was made into a 43% black population district. That district was 67 percent Democratic; it is now 73% Democratic.

Districts in Lucas County

Republican Plan 1991			Republican Plan 1992		
District No.	% of population that is Black	% of vote won by Democrat House candidate 1990	District No.	% of population that is Black	% of vote won by Democrat House candidate 1990
49	50.56%	84.59%	49	49.62%	82.59%
50	5.37%	69.40%	50	6.11%	70.05%
51	2.36%	43.66%	51	2.31%	45.47%
52	5.68%	54.12%	52	5.11%	52.09%

Across the four districts, the differences between the percent of the district population that is African-American are .94%, .74%, .05% and .57%, differences in other words, that range from a low of five one hundredths of one percent to a high of 94 one hundredths of one percent, a slight difference indeed. On the score of the percent of the vote won by the Democratic House candidate in 1990 —where considerable variation is possible even among districts in which the percent of the population that is African-American is roughly the same—the differences range from a low of one half of one percent to a high of two percent, once more slight differences indeed. In short the same unnecessary packing and cracking evident in the 1991 plan is equally in evidence in the 1992 plan and at almost identical levels in the two plans in the same proposed districts.

X

Montgomery County districts in the 1992 Plan

As was true for Lucas County, so is it with Montgomery County: The treatment accorded districts in Montgomery County is virtually the same in both the 1991 and 1992 plans.

In districts 36 and 37 in Montgomery County before the 1991 redistricting, African-Americans were 42.07% and 36.13% of the district populations. In the 1991 plan, these two districts were made into districts in which African-Americans were 54.59% and 32.23% of the population. In the 1992 plan, these two districts were made into districts in which African-Americans are 44.35% and 40.51% of the population. In other words, the African-American percent of the population of one district in the 1991 plan was reduced by ten percent by the 1992 plan but the African-American percent of the population of the other district was increased by nine percent. That still constitutes packing.

Before the 1991 redistricting, there were three safe Democratic seats. In both the 1091 and 1992 plans, there are two safe Democratic seats. Before the 1991 redistricting, the populations of two of the seats were a mix such that the Democratic candidate for those seats in 1990 won sixty-four and sixty-five percent of the vote. The 1991 plan made the population mix such that the percent of the vote won by the Democratic candidates for those two seats is ninety and seventy percent. In the 1992 plan, the comparable percent figures are eighty-four and seventy-two. In both the 1991 and 1992 plans, in other words, the populations of the old districts have been carefully distributed in such a way as to pack both African-Americans and non-African-American Democrats into the same districts thereby reducing from three to two the number of Democratic-leaning districts in Montgomery County.

Finally, what was done to what was district 39 in Montgomery before redistricting is particularly noteworthy. Old district 39 was the safest of all Democratic-leaning districts in Montgomery County. In 1990 the Democratic candidate received 75.38% of the vote in the general election. Yet the percent of the district's population that was African-American was relatively low: 4.69%. Its total population of 106280 meant it might have

remained intact as a district in any new plan. But in the 1991 it was instead broken up into four pieces. In the 1992 plan it was broken up into five pieces. In the 1992 plan the largest of these pieces—42206 persons, 39.7% of the district's population—was moved into one of the two new Democratic-leaning districts. Another 27008 persons—25.4% of the district's population—was moved into the second of the two new Democratic-leaning districts. The remaining 37114 persons—34.19% of the district's population—were moved under the 1992 plan into three districts which the data indicate would have been won by the Republican candidate for the House with between sixty and sixty-five percent of the vote had the 1990 House elections been held in the new districts. Two of the segments into which the population of the old district 73.95% and 73.02%, respectively, of those 6,522 and 30,545 persons voted for the Democratic House candidate in 1990. Those two population segments in the 1992 plan are found in districts where the Democratic candidate would have received 36.81% and 40.30% of the vote had the 1990 election been held in the districts created by the 1992 plan.

XI

Henderson's writing and expertise

Defendant's appear to want to question my competence when they say in numbered paragraph 98 at page 36 of their findings of fact that I have never written or published anywhere on apportionment, redistricting, gerrymandering, racial bloc voting or minority voting rights. That is not true. I have never published an article or book strictly devoted to any one of these subjects. In one of my college textbooks, *American Democracy*, at pages 143 through 150 I dicsuss reapportionment, multimember districts, at large- elections, and give an example of racial bloc voting (using homogeneous precinct analysis) using election data from Jackson, Mississippi.

Further, it is difficult to question my credentials unless you are prepared to question the judgment of the three-judge federal district court which ordered my redistricting plan put into place for the Rhode Island House of Representatives in the greater Providence area, the judgment of numerous federal district court judges who have accepted my analyses as credible and valid even when ruling against the party I was retained by, and the judgment of the U.S. Supreme Court itself which in an opinion handed down fifteen years ago, in May, 1977, commented favorably upon the "Henderson county boundary plan" a plan I drew for plaintiffs challenging the redistricting of the Mississippi legislature.

XII

Defendants also say in numbered paragraph 218 at page 98 of their findings of fact that I offered no support whatsoever as to how pieces of districts in the 1981 plan made parts of districts in the 1991 plan "corelated with wards and precincts." That is not true. A listing was provided which showed how anyone with access to the unified data base could identify the wards and/or precincts and/or blocks that made up what I labelled as "pieces"—those segments into which districts in the 1980 plan were divided each of which segments was to be found in a different district in the 1991 and 1992 plans. In the leftmost column on that listing appeared the unique identification number which was assigned to every item of census geography in the unified data base. That unique identification number enables one to tell what piece of census geography is associated with that number and therefore enables one to determine exactly what wards, precincts, and/or blocks were included in each piece into which districts in the 1980 plan were divided.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 1992.

/s/ Gordon G. Henderson
GORDON G. HENDERSON

* * * *

[Exhibit 5 to Brief of Plaintiffs in Response to the February 19, 1992 Filing of Defendants: filed March 6, 1992]

CHART 2

SUMMARY CHART SHOWING THE ELIMINATION OF INFLUENCE DISTRICTS WITH REPRESENTATIVES WITH 100% VOTING RECORDS ON MINORITY ISSUES [1]

District No.[2]	1981 Black Population [3]	Representative [2]	Voting Record [4]
32	26.6%	D. Conley	100%
17	26.0%	S. Bergansky [5]	100%
18	14.7%	J. Sheerer [5]	100%
47	13.2%	B. Quilter [6]	100%
30	12.4%	M. Stinziano	100%
15	34.9%	J. Campbell [5] [7]	100%

[1] Information showing the elimination of influence districts appears in Dykes Deposition Exhibit 20, p. 2. Information showing Representatives' voting records on issues of concern to the minority community appears in Henderson Deposition Exhibit 17 (showing 49 votes of concern to the minority community cast in the 115th-119th General Assemblies).

[2] Information taken from "Ohio Legislative Directory 119th General Assembly 1991-92," League of Women Voters of Cleveland Educational Fund, Inc. Voter Information Center, attached as Exhibit 3 to Plaintiffs' Conclusions of Law.

[3] Information taken from Dykes Deposition Exhibit 20, p. 2.

[4] Information taken from Henderson Deposition Exhibit 17.

[5] The 1991 plan pairs these three 100% responsive female representatives.

[6] Henderson Deposition Exhibit 17 transposes Representative Suster's name with Representative Quilter's name in District 47. Nevertheless, Representative Quilter is 100% responsive. See Henderson Deposition Exhibit 17 for District 47.

[7] In addition to the pairing of Representatives Bergansky, Sheerer and Campbell, the following eleven Democrats with 100% voting were paired: (1) Malone (Dist. 92); (2) Riffe (Dist. 89); (3) Czarcinski (Dist. 46); (4) Guthrie (Dist. 67); (5) Krupinski (Dist. 98); (6) Skeen (Dist. 69); (7) Seese (Dist. 41); (8) Koziura (Dist. 55); (9) Walsh Dist. 72); (10) C. Jones (Dist. 45); (11) Stinziano (Dist. 30).

[DOCKET =194]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 91CV-2219

BARNEY QUILTER, *et al.*,
Plaintiffs,

versus

GEORGE V. VOINOVICH *et al.*,
Defendants.

OPINION AND ORDER

Decided and Filed May 5, 1992

Before: JONES, Circuit Judge, PECK, Senior Circuit Judge, and DOWD, District Judge.

PECK, Senior Circuit Judge. This complex case, or rather series of cases, had its origin in *Armour v. Ohio* which was filed in the District Court for the Northern District of Ohio in 1988. The district judge to whom the case was assigned referred it to a magistrate who recommended denial of relief for the plaintiffs. The district court adopted the magistrate's recommendation. On appeal to the Sixth Circuit Court of Appeals, the decision of the district court was reversed by the court sitting en banc, 925 F.2d 987 (6th Cir. 1991), which remanded with

directions to certify the case to the Chief Circuit Judge for the appointment of a three-judge court under the provisions of 28 U.S.C. § 2284. Challenged in that case was the plan devised and promulgated by the Ohio Apportionment Board which is charged under the Ohio constitution with the drawing of the districts from which the members of the Ohio General Assembly which consists of the House of Representatives and the Senate, are elected. The specific plan under attack was adopted by the board in 1981. The three-judge court appointed pursuant to the certification held that a voting district boundary line in Mahoning County which split a large cohesive black population between two districts violated the Voting Rights Act and the fifteenth amendment, 775 F. Supp. 1044 (N.D. Ohio 1991). No appeal to the Supreme Court was perfected from that decision.

The present action placed the validity of the apportionment plan promulgated in 1991 as it applied to the entire state at issue. This court held the plan to be invalid in a two to one decision. *Quilter v. Voinovich*, No. 5:91-CV-2219 (N.D. Ohio Jan. 31, 1992). Thereafter, the Apportionment Board prepared another plan which this court decided, by a divided court, to be unconstitutional. No. 5:91-CV-2219 (N.D. Ohio Mar. 10, 1992). That plan was neither published nor promulgated as required by the Ohio constitution and one of the issues in the present case is whether that plan was in fact a new plan or simply a revision containing "technical corrections" of the 1991 Plan, as contended by the defendants. We hold that the "technical corrections" were so extensive and pervasive that the resulting document constituted a new plan, hereinafter referred to as the 1992 Plan.

Meanwhile, two original actions involving additional aspects of the entire situation were filed in the Supreme Court of Ohio, which were removed to the district court for the Southern District of Ohio. Neither of those actions is directly involved herein at this juncture. This

court appointed a Special Master charged with the responsibility of preparing a plan of redistricting, authorizing him to employ such technical assistance as was deemed necessary for the drafting of the plan, and providing that the cost of this process be assessed against the state of Ohio. On application of the defendants, the Supreme Court of the United States issued on April 20, 1992, an order staying orders of this court entered March 10 and 31. Thereafter, the Special Master filed a Status Report and Request for Instructions pointing out that the plan he had been directed to prepare was 75% to 80% complete, that completion could be accomplished within a matter of days, but that if discontinued at that time would be more difficult and time consuming, and therefore more expensive, to complete at a subsequent time. In response, we ordered the Special Master to proceed to complete the plan, then to file it with this court under seal in order to be available in the event the Supreme Court feels that it may be of assistance. It is parenthetically observed that the members of this court are not aware of the details nor of the thrust of the proposed report, and when and if such a plan is filed under seal its integrity will be maintained pending further instructions from the Supreme Court.

Meanwhile, the passage of time placed the date of the primary election in jeopardy and has placed the political process in a hazardous position. Originally scheduled for May 5, 1992, it was rescheduled by order of this court for September 8, 1992, but is presently scheduled to be conducted June 2, 1992. The Secretary of State of Ohio, who is the chief elections officer of the state, formally advised the Boards of Elections of the eighty-eight counties in the state to do all acts necessary for the conducting of the election on the latter date. Additionally, the plaintiffs in *Armour v. Ohio* filed a motion asking, *inter alia*, for the issuance of an order to show cause why the state of Ohio should not be held in contempt of court because

use of the 1992 Plan was in conflict with the April 23rd order of the *Armour* court requiring the election to take place under the 1991 Plan. We decline, however, to take cognizance of the entire motion, including the request for a show cause order, because the motion was filed in *Armour v. Ohio*. Because we hold that the election may proceed under the 1991 Plan, the *Armour* plaintiffs' other requested relief can be resolved by the *Armour* court at a later date.

The need for a resolution of the issues in this case has become critical because of the time requirements and cut-off dates for the filing of nominating petitions, other periods established by state statutes and regulations, and allowance for time for the printing of ballots and incidental literature. A full literal compliance with the administrative time requirements would necessitate a re-scheduling of the announced date for the primary. The election officials are therefore empowered and directed to make such truncations of time periods or other appropriate adjustments to the end that the goal of conducting the primary election on June 2, 1992 can be accomplished.

Pursuant to a motion filed by the plaintiffs herein, a status conference was conducted yesterday in open court which was attended by counsel for all of the parties, and at which many of the parties were personally present. In the course of that conference, which lasted for three hours, attorneys for all of the parties, including those for and against the motion filed by the plaintiffs in *Armour v. Ohio* made extensive, detailed arguments. Upon one point all of counsel, and indeed, the parties themselves, were in agreement; all agreed that only an immediate decision by this court, deciding first under which plan the election is to be conducted, and truncating to the greatest reasonable extent the time periods indicated above, could the June 2, 1992 date become a reality. Following recognition of such agreement, at the conclusion of the hearing the presiding judge announced that the case would be considered as submitted and that an

opinion deciding the salient issues would be forthcoming within twenty-four hours. It is against that deadline that this opinion is in preparation.

Turning to the major issue facing us for decision, we face the task of, in effect, selecting the least flawed of the proposed redistricting plans, since none is without legal imperfections. One possible alternative, it should be noted, that of simply ordering that no primary election be held for legislative offices until a legally flawless plan is presented, thus automatically permitting incumbents to hold office until that eventuality occurred, we reject out of hand as inappropriate. A reincarnation of the 1981 Plan is not, of course, an option, it having been replaced by the properly published and promulgated 1991 Plan. The 1991 Plan, however, contained several serious errors and omissions as detailed in a thirteen page submission from the defendants. For instance, in Cleveland, War 4 Precinct CC was completely omitted from the 1991 Plan. Similarly, Coventry Township, Precinct J, in Summit County was omitted. Numerous wards, precincts, and townships were erroneously divided. These deficiencies were corrected in the 1992 Plan. It is now our conclusion that deficiencies of the 1992 Plan are less egregious than those of the 1991 Plan.

In reaching this conclusion, we are in no way depreciating the importance of providing full enlightenment to the electorate by the publication and promulgation process. On the contrary, we regard public education concerning issues and candidates to be a paramount element of the democratic process. In the present instance, however, we conclude that that educational process has been more completely accomplished by the news media than it could have been accomplished through strict compliance with the legal requirements, which could have been met through bare-bones, back-page material which seldom, if ever, is studied by a substantial number of voters. In the present situation, we take judicial notice of the wide-

spread publicity that has been given to this case. The media throughout the state of Ohio has accorded space and time to a discussion of the entire matter, and, indeed, this morning's newspapers, television and radio stories have afforded full coverage, including mention of yesterday's notation that this court would announce a decision today. We therefore hold that substantial compliance with the publication and promulgation requirements have been met.

The fact remains, however, that the Apportionment Board promulgated the 1992 Plan on February 18, 1992, the Secretary of State issued instructions to the county election boards on February 19, 1992, and the filing deadline was February 20, 1992. As previously noted, considerable media interest was focused on this matter. Despite the degree of public attention, we are forced to conclude that the amount of time allowed to decide whether to run in the new districts was inadequate. Accordingly, we direct the Secretary of State to accept new candidate filings in any Ohio House or Senate district reconfigured by the February 18, 1992 amendments. The filing deadline is Friday, May 8, 1992, at 4:00 p.m. The Secretary of State is empowered to take all actions, notwithstanding any state election law or time period to the contrary, to assure that any candidates filing under this court-ordered grace period are included in the June 2, 1992 primary election.

IT IS SO ORDERED.

/s/ Nathaniel R. Jones
HON. NATHANIEL R. JONES
U.S. Circuit Judge

/s/ John W. Peck
HON. JOHN W. PECK
Senior U.S. Circuit Judge

Dowd, J. dissenting:

I respectfully dissent from that part of the Order which creates a limited period for candidates to file nominating petitions for the Ohio General Assembly.

First, I read the order of the Supreme Court of the United States staying this Court's Orders of March 10, 1992 and March 31, 1992, coupled with the fact that the Supreme Court will review those orders, to divest this district court of jurisdiction with respect to the 1992 Ohio election for the General Assembly. The Court held in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), as a general rule, that a district court is divested of jurisdiction once a notice of appeal has been filed. *See also Morris v. Morgan Stanley & Co.*, 942 F.2d 648 (9th Cir. 1991); *Masalosalov v. Stonewall Insurance Co.*, 718 F.2d 955 (9th Cir. 1983) and *Thomas v. Board of Education*, 607 F.2d 1043 (2nd Cir. 1979).

The only exception to the general rule that a notice of appeal divests the district court of jurisdiction is found in the situation where the district court is left with the duty of maintaining the status quo during the pendency of the appeal. *Kiddler, Peabody & Co. Inc. v. Maxrus Energy Corp*, 925 F.2d 556 (2nd Cir. 1991); and *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268 (9th Cir. 1976).

This is clearly not a case where the district court was vested with the responsibility of maintaining the status quo with regards to elections of members of the Ohio General Assembly. Before this Court was the narrowly defined issue of whether the 1991 Reapportionment Plan was constitutional under the Voting Rights Act and the fifteenth amendment. This Court does not have, nor ever did possess, the jurisdiction to oversee the election process in the state of Ohio. As such the exception identified in *Kiddler* and other cases is inapplicable. Since the defendant's have filed a notice of appeal with the United States Supreme Court, and the Supreme Court has in-

dicated that it will review this Court's March 10, 1992 and March 31, 1992 decisions, this Court is divested of jurisdiction and cannot address plaintiff's motion to stay.

In the event that my first reason is found to be without merit, I believe this Court should decline jurisdiction over ruling on what are clearly state, not federal, issues. Jurisdiction in this Court was invoked by claims brought under the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution.

Today's Order is in response to claims that the 1992 election for the Ohio General Assembly violates provisions of the Ohio Constitution and enactments of the General Assembly. As such, the plaintiffs seek to amend their complaint to include these pendent state claims. Direction as to the disposition of pendent state claims in federal cases was definitively provided in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In *Gibbs*, the Supreme Court held that pendent jurisdiction may be exercised when there is a substantial federal claim and the state claim arises from a "common nucleus of operative facts." *Id.* at 725.

The *Gibbs* Court noted that district courts are not required to hear state claims that satisfy the two prong test for pendency. The Court explained:

> [I]t has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them . . . Needless decisions of state claims should be avoided as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.

Id. at 726.

While the decision to exercise pendent jurisdiction lies within the discretion of the district court, the *Gibbs* Court held that the reasons for exercising pendent jurisdiction are not present in a situation where the federal claims are dismissed. "[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* 726. *See eg. Hardy v. Brimingham Board of Education*, 954 F.2d 1546, 1553 (11th Cir. 1992) ("in the absence of an issues of federal law, and with no federal subject matter jurisdiction other than pendent jurisdiction being present, pendent jurisdiction may not be exercised by a federal court."); *Sem-Torq v. K Mart Corp.*, 936 F.2d 851, 855 (6th Cir. 1991) ("when federal claims are dismissed before trial, the court should dismiss the state claim without prejudice."); and *Baer v. R & F Coal Co.*, 782 F.2d 600 (6th Cir. 1986).

In *Baer*, the plaintiff originally brought suit pursuant to the Age Discrimination in Employment Act. The district court ruled that his federal age claim was time barred, and dismissed the action. After the dismissal of his federal claim, the plaintiff attempted to add a state claim of age discrimination under the doctrine of pendent jurisdiction. The district court denied his request and dismissed the action, holding that because there was no longer a federal claim, there was no claim upon which the state claim could attach. Like the plaintiff in *Baer*, the plaintiffs in the present matter are attempting to interpose a state claim where no federal claim is currently pending.

It is my opinion that the decision of the United States Supreme Court staying this Court's March 10 and March 31, 1992 decisions operates as a dismissal of the federal claims under the Voting Rights Act and the fifteenth amendment for purposes of pendent jurisdiction analysis. In *Evans Transportation Company v. Scullin Steel Co.*, 693 F.2d 715, 718 (7th Cir. 1982), the court held that

"apart from the statute of limitations consequences, a stay is the equivalent of a dismissal without prejudice." *See also State Farm Mut. Auto Ins. Co. v. Scholes*, 601 F.2d 1151, 1155 (10th Cir. 1979) (court held that a stay of the present court's proceedings pending the resolution of the state court action would in effect operate as a dismissal without prejudice because a state court judgment would preclude litigation involved in the federal action); and *Centronics Data Computer Corporation v. Merkle-Korff Industries*, 503 F. Supp. 168 (D. New Hamp. 1980).

In the present case, the Supreme Court has stayed the two decisions of this Court that addressed the substantial federal claims under the Voting Rights Act and the fifteenth amendment. As such, for purposes of pendent jurisdiction, these issues must be treated as voluntarily dismissed. Since the federal claims upon which the plaintiffs wish to attach their state law claims are theoretically absent from this case, this court cannot exercise pendent jurisdiction and allow plaintiffs' state law claims.

Moreover, in the absence of a class certification, I find no standing on the part of any of the named plaintiffs in this action to seek the orders issued by the majority today. Not one of the plaintiffs is directly affected by the failure of the Ohio Apportionment Board to satisfy the publication requirements of O.R.C. 107.09. In their motion for stay, filed April 29, 1992, the plaintiff's attach the affidavit of James Randal Weston, who attests that he changed his residence in compliance with the "1991 Plan", only to be denied the right to run for General Assembly because he had failed to file pursuant to the revised "1992 Plan." While Mr. Weston's predicament is unfortunate, he is not a named plaintiff to this action, and is not the member of any recognized class approved by this Court. Since the plaintiffs are unable to demonstrate that any of the named plaintiffs have been prejudiced, they lack standing to seek today's Order.

The Order from which I dissent is anchored in the concern that potential candidates for the Ohio General Assembly were not given a fair opportunity to declare for the office, either as a candidate for the House of Representatives or as a candidate for the Senate, because the 1991 Plan as revised was not adopted until February 18, 1992 and the deadline for filing was a scant two days later.

While I sympathize with that justifiable concern that prompts the action of my colleagues, I note that no such candidate has sought relief in the state courts. I fear that the cure for the defect as adopted by my colleagues will severely jeopardize the ability of state and county election officials to conduct the 1992 primary in an orderly manner.[1]

/s/ David D. Dowd, Jr.
DAVID D. DOWD, JR.
U.S. District Judge

[1] The affidavit of John F. Bender, Chief Elections Counsel for the Secretary of State, presented to the Court at the status conference hearing conducted on May 4, 1992 and filed with the Cleck's Office on May 5, 1992 demonstrates the difficulties that this Order will create by reopening the process for candidates to declare for the June 2, 1992 primary. A copy of the affidavit is attached as Appendix A.

APPENDIX A

AFFIDAVIT OF JOHN F. BENDER

STATE OF OHIO,
COUNTY OF FRANKLIN, ss:

I, John F. Bender, Esquire, having been first duly SWORN and cautioned states that:

1. I am the Chief Elections Counsel for Secretary of State of Ohio Bob Taft. In that capacity I am responsible for supervising Ohio's elections system and having knowledge of matters concerning the operation of that system.

2. If the United States District Court for the Northern District of Ohio issues an order mandating that General Assembly candidates must run from districts established by the Apportionment Plan submitted in October 1991 and not from districts established by the Apportionment Plan as amended on February 18, 1992, a primary election for General Assembly candidates cannot be held on June 2, 1992.

3. There are only 29 days remaining prior to June 2, 1992. There is insufficient time remaining prior to June 2, 1992 to redraw district lines, reprint ballots, determine affected candidates, and reprogram automatic and electronic voting machines for General Assembly candidates to run under the October 1991 districts.

4. Ballots including absentee ballots have been printed and voting machines programmed for all of Ohio's 13,000 plus precincts for districts established by the Apportionment Plan as amended on February 18, 1992. New ballots cannot be printed without General Assembly candidates. Therefore ballot pages will have to be removed in 66 counties utilizing the "punch card" system and names "blocked off" in counties using an automatic or optical scan system. In addition in those counties using automatic voting sys-

tems, machines must be reprogrammed or calibrated and levers covered. Some counties estimate this takes up to 35 days. In Franklin County alone this involved approximately 2800 voting machines in 700+ precincts. There machines are currently being placed or are in place in the precincts.

5. Tens of thousands of ballots must be revised. There will not be time to accomplish those actions specified in paragraph 3 above and voters will vote on non-existent races. Also there exists the probability of programming errors which can effect the validity of other races. Finally in many counties, including Cuyahoga County Ohio's largest, General Assembly races are printed on the same ballot page as other races. Those ballot pages cannot be removed.

6. Absentee ballots must be available no later than May 13 for distribution beginning no later than May 20, 1992. Given this time frame, many of these ballots cannot be "blocked out" for General Assembly candidates. In fact, Portage County will begin distributing absentee ballots on May 5, 1992.

7. Since all candidates have filed and been certified under the districts as provided in the February 18 plan, reverting to the October plan may necessitate establishing new filing and certification deadlines. Either allowing all candidates in affected and non aflected districts to refile or allowing only candidates in affected districts to refile will raise legal challenges based on equal protection and due process.

8. The chaos and confusion created among voters who will vote on nonexistent races, candidates who are filed and certified, and elections officials who must now attempt to remove General Assembly races from the ballot will undermined public confidence in the elections system and potentially affect the validity of the whole primary.

9. Ensuring a second primary on September 8 or some other date creates the chaos and confusion raised in my prior affidavit of April 3, 1992 attached to the Supplemental Memorandum in Support or Application to Stay Order of the District Court filed with the U.S. Supreme Court on April 6, 1992 which is attached hereto and incorporated as if fully rewritten herein.

/s/ John F. Bender
JOHN F. BENDER

SWORN to before me and subscribed in my presence this 4th day of May, 1992, in Franklin County, Columbus, Ohio.

/s/ [Illegible]
Notary Public
My Commission Has No
Expiration Date

No. A-693

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1991

GEORGE V. VOINOVICH, *et al.*,
Appellants,

v.

BARNEY QUILTER, *et al.*,
Appellees.

AFFIDAVIT

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

Now comes John F. Bender, being first duly cautioned and sworn, says that in his capacity is Chief Elections Counsel to the Ohio Secretary of State, he is responsible for compliance with and enforcement of Ohio elections laws.

Affiant says that in its Order of March 31, 1992, the District Court, in the Case of *Quilter v. Voinovich*, No. 5:91CV2219 (N.D. Ohio, March 31, 1992), stated:

> Having been advised by the office of the Secretary of the State of Ohio that the date of June 2, 1992, for the primary election for the purpose of selecting candidates for membership in the General Assembly of Ohio to be voted upon at the General Election to be held November 3, 1992 as directed by order en-

> tered herein March 10, 1992 cannot be met and must be vacted, said primary election is hereby rescheduled to be held September 8, 1992. It is further ordered that the Secretary of State of Ohio be and he hereby is enjoined to do all such acts as may be necessary for the holding of such primary election September 8, 1992.

On April 2, 1992, Counsel for Appellees in this case, in their Supplemental Memorandum in Opposition to Appellants' Application for a Stay, stated that "[t]he Secretary of State of Ohio, Robert A. Taft, a Defendant-Appellant herein, has advised the trial court that the State of Ohio could not meet the June 2, 1992, primary date for election to the Ohio General Assembly set by the trial court." Appellees' statement is a mischaracterization of the position of the Ohio Secretary of State. Since the Order of March 10, 1992, enjoining the May 5, 1992, primary date, the Secretary of State has consistently maintained that in order to hold a primary election on June 2, 1992, new legislative districts would have to be in place no later than March 27, 1992. A primary election could, therefore, take place on June 2, 1992, under the legislative districts established under the 1991 plan of apportionment, which plan was enjoined by the District Court on March 10, 1992.

Affiant further states that the Ohio General Assembly, in House Bill 700, signed by the Governor, in an effort to avoid the necessity of holding two primary elections in 1992, moved the entire Ohio primary election to June 2, 1992, the date originally set as the date for the primary election by the District Court in this case.

Affiant says that the District Court's Order of March 31, 1992, fixing September 8, 1992, as the date of the primary election for members of the Ohio General Assembly, unless stayed by this Court, will necessitate the holding of two primary elections in Ohio in 1992, at an additional cost of approximately $6,000,000.00.

Affiant states that local boards of elections will be in the middle of preparing for the November 3rd general election on September 8. To prepare for a special primary while preparing for the August special and November general elections will present many local boards with massive administrative and financial problems. Counties which are responsible for paying for elections have indicated they cannot afford an additional election due to budgetary constraints.

Affiant says that a September 8, 1992, primary election means Ohio will have three statewide and two special elections in 1992, rendering the recruitment of sufficient qualified pollworkers for five elections in one year impossible in some areas.

Affiant further states that under Ohio law, voting machines must be locked for 60 days after an election, to preserve evidence of the official votes cast. If a primary is held on September 8, 1992, the machines cannot be unlocked in time for the November 3, 1992, general election. Likewise, voting machines used for the August special election cannot be used on September 8, 1992. The State of Ohio will, therefore, have an insufficient number of voting machines available to conduct an election on September 8, 1992, which complies with Ohio law.

Affiant says that by the establishment of a September 8, 1992, primary election date, many out-of-state and military Ohio citizens may not be aware of the new primary or of the need to request absentee ballots for that date. Affiant further says that by law, absentee ballots must be available 35 days prior to the November 3, 1992, general election. A September 8, 1992, primary will allow only six days to print absentee ballots, an impractical deadline to meet. Absentee ballots for the September 8, 1992, primary would have to be made available on the same day as the absentee ballots provided for the August 4, 1992 special election, which will create great confusion among the absentee voters.

Further, Affiant says that candidates for election to the Ohio General Assembly have already filed under existing districts. To hold a September primary with new districts may force candidates to move more than once to meet the Ohio constitutional and statutory residency requirement.

Further Affiant says not.

/s/ John F. Bender
JOHN F. BENDER

Sworn to and subscribed in my presence this 3rd day of April, 1992.

/s/ [Illegible]
Notary Public
My Commission Has No
Expiration Date

Supreme Court, U.S.
FILED
JUL 30 1992
OFFICE OF THE CLERK

No. 91-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE V. VOINOVICH, Governor of the State of Ohio, *et al.*,

Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPELLANTS' BRIEF

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QUESTIONS PRESENTED

Whether the district court erroneously held that state reapportionment officials must, as a prerequisite to redistricting, conduct a totality of circumstances analysis adopted by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Whether the district court erroneously shifted the burden of proof from plaintiffs attacking legislative districts as diluting minority voting strength to defendant reapportionment officials by requiring them to prove a violation of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, prior to the creation of any minority controlled state legislative districts.

Whether the district court's finding of a violation of § 2 of the Voting Rights Act is erroneous.

Whether the district court erroneously enjoined the primary election for members of the Ohio General Assembly and appointed a special master to redraw Ohio's state legislative districts without first affording defendants a reasonable opportunity to adopt substitute districts.

Whether the district court's finding of a violation of the Fifteenth Amendment is erroneous.

Whether the district court's finding of a violation of the Fourteenth Amendment is erroneous.

LISTING OF ADDITIONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Chio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES B. SPEROS, KENNETH THORNE, CHARLES WALKER, WILLIAM SHANKLIN, CLARENCE LUMPKIN, TYRONE RILEY, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District, MARY ABEL, Representative of the 94th Ohio House District, and WILLIAM MALLORY, Representative of the 23rd Ohio House District.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1618

GEORGE V. VOINOVICH, Governor of the State of Ohio, *et al.*,

Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Ohio

APPELLANTS' BRIEF

OPINIONS BELOW

The January 31, 1992 Opinion and Order of the three-judge court has been officially reported at —— F. Supp. ——, 1992 WL 114748. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and is set out in the *Appendix to Jurisdictional Statement* at App. 1a-46a.[1]

[1] The following citation abbreviations are used in this brief:

App. *Appendix to Jurisdictional Statement*
J.A. *Joint Appendix*
D. Docket Number
Ex. Exhibit Number

For the convenience of the Court, a table of the docket and exhibit numbers cited herein is attached as an appendix to this brief.

"Appendix 2" to Judge Dowd's dissenting opinion was filed on February 3, 1992, and is set out at App. 47a-117a.

The February 18, 1992 Findings and Conclusions of the Ohio Apportionment Board, on remand following the January 31, 1992 Opinion and Order of the three-judge court, were filed with the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and are set out at App. 160a-273a.

The March 10, 1992 Order of the three-judge court has been officially reported at —— F.Supp. ——, 1992 WL 114880. It is set out at App. 118a-126a.

The March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge district court has not yet been officially reported. It is set out at App. 127a-148a.

The March 31, 1992 Order of the three-judge district court has been officially reported at —— F.Supp. ——, 1992 WL 122792. It is set out at App. 324a.

The May 5, 1992 Order of the three-judge district court has been officially reported at —— F.Supp. ——, 1992 WL 114881. It is set out at J.A. 333-50.

JURISDICTION

The Orders appealed from were filed on March 10, 1992, March 19, 1992, and March 31, 1992. Notices of Appeal from these Orders were filed on March 11, 1992, March 25, 1992, and April 1, 1992, respectively. App. 149a, 156a, 325a. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The text of the Fourteenth and Fifteenth Amendments to the United States Constitution, 28 U.S.C. §§ 1253 and 2284, 42 U.S.C. §§ 1973 and 1973c, and Article XI of the Ohio Constitution is set out at App. 274a-286a.

STATEMENT OF THE CASE

Pursuant to Article XI, § 1, of the Ohio Constitution, the Ohio Apportionment Board[2] convenes every ten years in the year following the decennial census. App. 279a. The 1991 Apportionment Board, consisting of Defendants-Appellants (Governor George V. Voinovich, Secretary of State Robert A. Taft, Jr., and Ohio Senate President Stanley J. Aronoff) and two of the Plaintiffs-Appellees (Auditor of State Thomas E. Ferguson and Speaker Pro Tempore of the Ohio House of Representatives Barney Quilter) convened on August 22, 1992. App. 160a, 163a.

At the initial meeting, the Board elected Governor Voinovich as its Chairman, D. 123 at 8, and appointed Defendant-Appellant James R. Tilling, Chief Executive Officer of the Ohio Senate, as its Secretary. App. 161a. In addition, the Board, for the first time in Ohio history, determined that the apportionment process should be open for public input to the extent reasonably possible given constitutional time constraints.[3] Accordingly, the Board agreed to hold a series of public hearings throughout the state for the purpose of receiving suggestions, comments, testimony, and other evidence from members of the general public concerning the reapportionment of the Ohio General Assembly. J.A. 272. The Board also directed that a computer terminal, as well as its census data base and reapportionment software, be made available to the public so that those who wished to submit

[2] The Ohio Constitution does not actually create an "Apportionment Board," but rather provides that the Governor, Secretary of State, Auditor of State, and two persons chosen by the legislative leaders "shall be the persons responsible for the apportionment of this state for members of the general assembly." Ohio Cont., Art. XI, § 1; App. 279a. For ease of reference, these apportioning persons will hereinafter be referred to as the "Apportionment Board" or the "Board."

[3] Under Article XI, § 1 of the Ohio Constitution, the Apportionment Board can convene no earlier than August 1, and must publish a plan no later than October 5. App. 279a.

plans for the Board's consideration would have the opportunity to do so. J.A. 275.[4] The Board adopted rules providing that anyone desiring to submit a plan for the Board's consideration should do so by 4:00 p.m. on September 26, 1991. Ohio Adm. Code § 011-1-09.

Following the initial meeting, Appellants Voinovich, Taft, and Aronoff directed Appellant Tilling to draft and submit a plan on behalf of the majority members of the Apportionment Board. J.A. 272; D. 75 at 11; D. 102 at 11; D. 123 at 7-8. Tilling was directed to submit a plan that complied with the Ohio Constitution, the United States Constitution, and the Voting Rights Act, 42 U.S.C. § 1973 *et seq.* J.A. 272; D. 75 at 13; D. 123 at 9. The majority members of the Board stressed to Tilling that the preservation of county and political subdivision boundaries was an important goal in drafting the plan. J.A. at 272-74. The majority members did not continually monitor Tilling during the drafting of the plan, but rather entrusted him to follow their instructions. J.A. 234; D. 75 at 16, 18-19; D. 102 at 73-74; D. 110 at 15-16.

Tilling did not immediately begin drafting a plan on behalf of the majority members of the Board. Rather, he attended all of the public hearings throughout the state. D. 154, Exs. 1-14; D. 102 at 63-64, 69. At most of these hearings, the Apportionment Board heard testimony from members of the minority community imploring the Board to enhance minority voting strength by creating more minority controlled districts, *i.e.*, districts in which a minority group constituted a majority of the population.[5]

[4] The computer software, *i.e.*, the "unified data base" which aligned census data with political subdivision boundaries, did not become available until late August or early September, 1991. D. 123 at 166-67.

[5] For example, Dana Mattison, Executive Director of the Black Elected Democrats of Ohio ("BEDO"), testified at several of the public hearings and called for the "enhancement" of minority voting strength. D. 154, Ex. 1 at 34-37; Ex. 2 at 30-31; Ex. 3 at 29-30; Ex.

The district court in this case referred to such districts as "majority-minority districts." *Quilter v. Voinovich*, App. at 2a (N.D.Ohio Jan. 31, 1992).

It was at these hearings that Tilling, who is not a lawyer, made certain statements about the Voting Rights Act to members of the general public. Appellees, as well as the district court, have mischaracterized Tilling's approach as blindly requiring the creation of minority controlled districts "wherever possible." See, e.g., *Quilter v. Voinovich*, App. at 9a (N.D.Ohio Jan. 31, 1992). In fact, Tilling's statements, all given prior to the drafting of the plan, have been taken out of context and do not accurately reflect either Tilling's view of the Voting Rights Act or the process he used in drafting the 1991 plan of apportionment. A full review of the public hearing transcripts reveals that reference to these isolated comments does not accurately convey the substance of Tilling's explanation of the significance of the Voting Rights Act. For example, in the September 7, 1991 Columbus public hearing, Tilling stated:

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5 at 39-40; Ex. 14 at 29-30. Numerous other representatives of the minority community made such requests at the hearings throughout the state: Floyd Johnson, coordinator of the reapportionment project for the National Association for the Advancement of Colored People, Ohio Conference of Branches ("Ohio NAACP"), at the Dayton and Columbus hearings, D. 154, Ex. 5 at 64-65; Ex. 13 at 99-100; Bishop Henry H. Brownlee at the Toledo hearing, D. 154, Ex. 1 at 72-73; Fred Parker, Vice President of the Columbus NAACP at the Columbus hearings, D. 154, Ex. 2 at 25-26; Ex. 13 at 19-20; William Nelson, Ph.D., Professor of Political Science and Black Studies at the Ohio State University, at the first Columbus hearing, D. 154, Ex. 2 at 41-42; Warrensville Heights Councilman James Mitchell, representing the Black Elected Suburban Officials, at the Cleveland hearing, D. 154, Ex. 3 at 25; Frank Allison, President of the Cincinnati NAACP, at the second Columbus hearing, D. 154, Ex. 13 at 42-48; Samuel Gresham, Jr., President and Chief Executive Officer of the Columbus Urban League, at the second Columbus hearing, D. 154, Ex. 13 at 56; Mark Bradley, of the People's Coalition for Voter Participation, at the second Columbus hearing, D. 154, Ex. 13 at 62-64; and Cathy Mock, President of the Young Black Democrats, at the second Columbus hearing, D. 154, Ex. 13 at 110.

> I appreciate it and I'd like the record to show that is our interpretation as well and it's one of the most important reasons we are soliciting input to the black community around Ohio . . . . *We need to establish for the record the totality of the circumstances in each urban area in order for us to do our job correctly*, so we need your help and we need the help of the other minority communities around the state, but that is our interpretation of the Armor [*sic*] case [*Armour v. Ohio*, 775 F.Supp. 1044 (N.D.Ohio 1991)] and Voting Rights Act as well, so I appreciate very much your comments.

D. 154, Ex. 13 at 33 (emphasis added).[6]

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[6] Similarly, Tilling explained his view of the Voting Rights Act during his November 20, 1991 deposition:

> A. * * * I think the first thing as a result of all the discussion and all the readings that I had done, I think uppermost in my mind was the notion that if you look at the entire totality of the circumstances, the principle that we should seek to achieve is no dilution of minority voting rights.
>
> * * *
>
> Q. Do you have the statement, "Courts have said wherever you can create a majority/minority district you must do so. It's just that simple"?
>
> A. Yes.
>
> Q. Was that your statement?
>
> A. I believe that is a statement that follows in my opening remarks where I said that the first guideline the Apportionment Board is operating under is that minority representation cannot be diluted. * * * [M]inority representation cannot be diluted in the process of drawing lines. And then I go on to say that, you know, where majority/minority districting could be created they should do so.
>
> * * *
>
> Q. Was that a true and accurate statement at the time you made it?
>
> A. Well, I would say for purposes of introducing the subject to people that we're [sic] not experts. It's a simplified statement of reality, but we only had an hour and a half or two hours for the meeting and so the purpose of the meeting was to try to get input from the community and I was trying to be

In addition to receiving public testimony regarding the creation of minority controlled districts, Tilling drew upon his extensive past personal experience in Ohio politics as Chief Executive Officer of the Ohio Senate and chief Republican campaign strategist for Ohio Senate campaigns, and upon his expertise as a political science professor at Ohio University in Athens, Ohio, to conclude that this Court's framework in *Thornburg v. Gingles*, 478 U.S. 30 (1986), supported the creation of minority controlled districts in Ohio's urban counties. D. 102 at 4-7, 162-63, 168-69; D. 123 at 64-65. Tilling did not believe that a formal analysis, including a detailed statistical ecological regression analysis, was required prior to his drafting of the plan, D. 104 at 28-29, and therefore devoted his scarce time to other tasks involved in preparing his proposed plan. D. 102 at 33, 38; D. 123 at 184-85.[7]

When Tilling began drafting the plan, he consulted with the National Association for the Advancement of Colored People, Ohio Conference of Branches ("Ohio NAACP") to help ensure the protection of minority

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> as brief and concise as possible and basically give them an overview of the process and then listen to the minority and other interested parties' input. W..s similar to a statement that does appear in the NAACP handbook, "Minority Guide to Voting."

D. 102 at 24-27. In response to a further question about applicable standards, Tilling continued his explanation:

> A. Well, as I said, the simplest description of it is in the "Minority Guide to Redistricting" by the NAACP, that *in the state where you have examples of racial block* [sic] *voting and you have a minority group that is sufficiently compact that a majority/minority district can be drawn for them*, that in fact should be done.

D. 101 at 29 (emphasis added). See also D. 102 at 162.

[7] The computer system and software purchased for reapportionment had not become operational until late August or early September, 1991, and the plans were due no later than 4:00 p.m. on September 26, 1991. D. 123 at 166-67.

interests in the reapportionment process. D. 73 at 44; D. 102 at 119-22; D. 123 at 50, 173-85. Contrary to the district court's characterization of Tilling as blindly creating minority controlled districts "wherever possible," Tilling clearly explained, in his deposition of November 20, 1991, that he created such districts only after he concluded that they were warranted by the "totality of circumstances." D. 102 at 44-47.

Tilling concluded that minority populations in Ohio were sufficiently large and geographically compact to constitute a majority in approximately nine Ohio House districts, D. 123 at 63-76, that these minorities (African-Americans) were politically cohesive, D. 123 at 66-73, and that racial bloc voting existed throughout Ohio. D. 102 at 30, 162-63; D. 123 at 64-76, 93.[8] Tilling also noted that minorities in Ohio suffered from the effects of past discrimination, D. 123 at 93-99, 124,[9] that the political

[8] In reaching the conclusion that racial bloc voting existed throughout Ohio, Tilling took into account his personal knowledge of numerous campaigns which pitted white against black candidates, including the 1988 Democratic Presidential primary involving Jesse Jackson, Cleveland and Columbus mayoral races, a Cuyahoga County Clerk of Courts race, a Columbus City Attorney race, state legislative races going back to 1982, and several statewide races. D. 102 at 30-32, 35, 171-73; D. 123 at 91. Tilling was also aware of the lawsuit commenced by William Mallory, who is a Plaintiff-Appellee in this case, challenging Hamilton County municipal court elections as diluting minority voting strength in violation of the Voting Rights Act, see *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991). D. 102 at 36; D. 123 at 70-71, as well as the testimony at the public hearings reflecting racial bloc voting in numerous elections throughout the state. D. 102 at 30-31. He looked at these materials "to satisfy ourselves that there was a preference of black voters for black candidates where that choice is available, but most importantly that the white majority or component of that district that was made up of white voters did not support the black candidate in anywhere near those numbers, effectively to show there was polarized racial block [sic] voting." J.A. 11.

[9] Tilling was aware that the school systems in Cleveland, Columbus, Cincinnati, and Dayton were under court desegregation

party nominating process had not been equally open to black candidates, D. 102 at 166-68, 171-72; D. 123 at 97-98, and that past campaigns had been characterized by racial appeals. D. 102 at 194-97. Tilling was, of course, aware that African-Americans were incumbents in several districts in Ohio which did not have a majority of African-American voting age population, J.A. 11, but rejected the notion that the reapportionment be based upon the incumbencies of African-American legislators. D. 102 at 47-48; D. 123 at 90, 176-78.

As noted above, Tilling did not begin to draft his proposed plan until mid-September 1991, following the series of public hearings. D. 102 at 63-64. Using the framework provided in Article XI, § 10 of the Ohio Constitution, Tilling began by designating the four counties having a population between 95% and 105% of one house "ratio of representation" [10] as single county house districts. See Ohio Const., Art. XI, § 10(A); App. 283a; D. 102 at 42-43; D. 123 at 58. Consistent with the Ohio Constitution's express policy, as well as the Apportionment Board majority's express instructions to him to preserve county boundaries where reasonably possible, Tilling then designated the three counties having a population between 90% and 95% or between 105% and

orders, that African-Americans had a higher rate of unemployment than caucasians, had lower education levels, lived disproportionately in substandard housing, and had lower voter turnout. D. 123 at 96-99, 124.

[10] Article XI, § 2 of the Ohio Constitution provides that "[t]he whole population of the state, as determined by the federal decennial census . . . , shall be divided by the number 'ninety-nine' and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment." App. 280a. That section similarly provides that "[t]he whole population of the state . . . shall be divided by the number 'thirty-three' and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment." App. 280a. Senate districts are constructed by combining three whole house districts. Ohio Const., Art. XI, § 11; App. 284a.

110% of one house ratio as single county house districts. See Ohio Const., Art. XI, §§ 9, 10(B); App. 283a; D. 102 at 43; D. 123 at 58.

Proceedings to § 10(C), Tilling next began drawing boundaries for house districts within those counties entitled to more than one house district, proceeding from the largest county to the smallest.[11] D. 102 at 43-44; D. 123 at 60-61. This progression resulted in the creation of House Districts 8 through 80, and included the creation of all house districts within Ohio's eight urban counties, *i.e.*, Cuyahoga (Cleveland), Franklin (Columbus), Hamilton (Cincinnati), Montgomery (Dayton), Summit (Akron),

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[11] It is undisputed that the majority of these districts had to be reconfigured because they did not meet the population requirements of Article XI, § 3 of the Ohio Constitution. *Quilter v. Voinovich*, App. at 59a-60a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 172a-174a (Ohio Apportionment Board Feb. 18, 1992). The boundaries of those districts which did meet the population requirements could not be retained because the boundaries of most of the districts surrounding them had to be reconfigured to either add or subtract population. *Quilter v. Voinovich*, App. at 61a-62a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 175a-176a (Ohio Apportionment Board Feb. 18, 1992); D. 123 at 81. In general, Ohio experienced a population shift from the northeastern quadrant of the state to the central and southwestern portions of the state, with Cuyahoga County losing one full house district and Franklin County gaining one full house district. *Quilter v. Voinovich*, App. at 58a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting); *Findings and Conclusions*, App. at 172a (Ohio Apportionment Board Feb. 18, 1992); D. 102 at 110-13; D. 123 at 61-63.

Appellees alleged that Appellants' failure to retain the few districts which did meet the population requirements violated Article XI, § 7(D)'s requirement that prior district boundaries be retained to the extent reasonably possible. D. 47 at 11-13. Appellees raised, but abandoned, this issue before the Ohio Supreme Court, see *Voinovich v. Ferguson*, 63 Ohio St.3d 198, 206 (1992) (Douglas, J., concurring), and the district court in this case abstained on all questions of state law. *Quilter v. Voinovich*, App. at 15a (N.D.Ohio Jan. 31, 1992). Consequently, neither that issue nor any other issue of state law is presently before this Court.

Lucas (Toledo), Stark (Canton), and Mahoning (Youngstown),[12] and the minority controlled districts at issue in this case. See App. 90a.[13] Tilling completed his

[12] The districts in Mahoning County were drawn pursuant to the federal district court's order in *Armour v. Ohio*, 775 F.Supp. 1044 (N.D.Ohio 1991), in which the court concluded that the 1981 Apportionment Board had discriminated against African-Americans, both under the results test of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, and intentionally in violation of the Fifteenth Amendment, by splitting the African-American population in Mahoning County between two house districts. The majority of the *Armour* court consisted of Judges Jones and Peck, who also comprise the majority of the district court in the case at bar. The State did not appeal from this ruling and, accordingly, the 1991 Apportionment Board configured the house districts in Mahoning County in conformity with the district court's ruling. D. 123 at 77-78. The districts in Mahoning County have not been challenged in this case.

[13] During Tilling's drafting of these districts, it became apparent that there was a conflict under the Ohio Constitution with respect to the drawing of district lines in northeastern Ohio. D. 123 at 146-51. Consequently, on September 19, 1991, Voinovich, Taft, and Aronoff commenced a declaratory judgment action in the Ohio Supreme Court against Ferguson and Quilter (Appellees here) and others. On September 24, 1991, defendants Ferguson and Quilter removed the action to the United States District Court for the Southern District of Ohio. In their removal petition, Ferguson and Quilter suggested that removal was based upon 28 U.S.C. § 1441(b) and § 1443. Plaintiffs moved to remand the case to the Ohio Supreme Court, arguing that removal was improper under both of these sections.

On October 28, 1991, District Judge Graham remanded the case to the Ohio Supreme Court. On October 30, 1991, Defendants Ferguson and Quilter filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit and simultaneously filed a motion to stay the remand order, which Judge Graham denied on November 1, 1991.

Thereafter, the Ohio Supreme Court recommenced proceedings upon remand, and on November 20, 1991, issued a scheduling order for the submission of evidence and the filing of briefs. *Voinovich v. Ferguson*, 62 Ohio St. 3d 1209 (1991). On November 21, 1991, three weeks after Judge Graham had denied their motion for a stay and after the Ohio Supreme Court had recommenced proceedings

draft of the plan by combining the remaining areas of the state into the remaining nineteen house districts. Ohio Const., Art. XI, § 10(D); App. 284a; D. 102 at 44.

Pursuant to the Board's rules, Tilling submitted his plan to the Board on September 26, 1991. Three other plans were submitted for the Board's consideration prior to the deadline on that date: one drafted by Robert R. Dykes ("Dykes") on behalf of the Democrat members of

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on remand, Ferguson and Quilter filed an "emergency" motion with the Sixth Circuit requesting a stay of the Ohio Supreme Court proceedings. At 8:42 p.m. on November 25, 1991, a panel of the Sixth Circuit, by a two-to-one vote, issued an order which had the effect of staying the proceedings of the Ohio Supreme Court. The two judges in the majority on the stay motion were Judges Jones and Peck, two of the three judges sitting on the three-judge court in the instant case. Judges Jones and Peck suggested that the *Voinovich* plaintiffs, who are Defendants-Appellants in this case, filed the *Voinovich* action *on September 19, 1991*, "to interfere with and to divert the jurisdiction of the federal court to proceed to judgment in" *this* case, even though *this* case *was not filed until November 1, 1991*. *Voinovich v. Ferguson*, No. 91-4057, slip op. at 3 (6th Cir. Nov. 26, 1991). Circuit Judge David A. Nelson dissented.

On December 12, 1991, the Sixth Circuit *sua sponte* issued an *en banc* order granting rehearing and vacating the stay order. *Voinovich v. Ferguson*, No. 91-4057 (6th Cir. Dec. 12 & 13, 1991) (*en banc*). In an opinion filed on December 23, 1991, Judge Jones, joined by Judge Peck, dissented from the granting of the rehearing *en banc*. *Voinovich v. Ferguson*, No. 91-4057 (6th Cir. December 23, 1991) (Jones, J., dissenting). Ferguson and Quilter dismissed their appeal following the granting of rehearing.

The Ohio Supreme Court once again commenced proceedings in the *Voinovich* case, and on January 13, 1992, denied motions to dismiss. *Voinovich v. Ferguson*, 62 Ohio St.3d 1224 (1992). On February 14, 1992, the Ohio Supreme Court issued a decision in which it concluded that the plan of apportionment was constitutional under the Ohio Constitution, specifically with reference to those districts which the district court in this case, in its March 19, 1992 opinion, App. at 127a, declared to be in violation of the Fourteenth Amendment. *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992).

the Apportionment Board,[14] one by the Black Elected Democrats of Ohio ("BEDO"), whose plan mirrored that submitted by the Democrat members, *Findings and Conclusion*, App. at 164a (Ohio Apportionment Board Feb. 18, 1992); D. 123 at 36, and one by the Ohio Republican Party. *Quilter v. Voinovich*, App. at 50a (N.D.Ohio Jan. 31, 1992) (Dowd, J., dissenting); *Findings and Conclusion*, App. at 163a (Ohio Apportionment Board Feb. 18, 1992); D. 123 at 34. In addition, two partial plans were submitted: one by the Ohio NAACP for all urban areas of the state, and one by Mike Jones for minority controlled districts in Franklin County. D. 123 at 34-35.[15] The partial plan submitted by the Ohio NAACP was nearly identical to the districts in the urban areas under the plan submitted by Tilling pursuant to the instructions of the majority members of the Apportionment Board. D. 103 at 22-23.

The Board reconvened on September 30, 1991, to consider the various plans and to receive any amendments. D. 154, Ex. 15 at 5-8. After hearing testimony on all of the plans, the Board recessed until the following day. D. 154, Ex. 15 at 132. On October 1, 1991, after several hours of consultations which included Tilling, the Ohio NAACP, BEDO, the Black Elected Democrats of Cleveland, Ohio ("BEDCO"), Senator Jeff Johnson, an African-American member of the General Assembly, and Representative Louis Stokes, an African-American member of the United States Congress from Cleveland, D. 154, Ex. 16 at 2-12; D. 123 at 39-40, a consensus was reached and the Tilling plan was amended to include the

[14] Dykes was the drafter of the 1981 plan of apportionment which the *Armour* court concluded discriminated against minorities. 775 F.Supp. at 1060-61. See also D. 154, Ex. 15 at 75-77.

[15] Jones testified at the Apportionment Board's hearing on September 30, 1992, that he represented the South Side Community Action Association and that the plan submitted by Tilling on behalf of the majority members of the Board satisfied that group's concerns. D. 154, Ex. 15 at 85-86.

districts in Cuyahoga County endorsed by the minority community. D. 154, Ex. 16 at 29-30.[16] The Apportionment Board then proceeded to adopt the Tilling plan, as amended. D. 154, Ex. 16 at 31-32.

The Board reconvened on October 3, 1991, to make several technical amendments to the plan, and the plan adopted on October 3, 1991, was labeled as "Amendment C." D. 154, Ex. 17 at 9-14. "Amendment C" was published throughout the state beginning on October 5, 1991, as required under the Ohio Constitution. See Ohio Const., Art. XI, § 1; App. 279a-280a.

On November 1, 1991, Plaintiffs-Appellees[17] commenced this action in the United States District Court for the Northern District of Ohio, alleging violations of § 2 of the Voting Rights Act, 42 U.S.C. § 1973, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution. D. 1; J.A. 1. Chief Judge Merritt of the United States Court of Appeals for the Sixth Circuit appointed Circuit Judge Nathaniel R. Jones and Senior Circuit Judge John W. Peck to the three-judge panel designated to hear the case. D. 7; J.A. 1. United States District Judge David D. Dowd, Jr. was the third member of the three-judge court.

On November 14, 1991, the District Court advised counsel that this case would be tried on December 3,

[16] The amendment reduced the number of minority controlled districts in Cuyahoga County from five to four. D. 154, Ex. 16 at 16-17, 22.

[17] As noted above, Appellees include Apportionment Board members Ferguson and Quilter. Appellees Richard Cordray, Paul Mechling, Ronald Gerberry, Mary Abel, and William Mallory, like Quilter, are incumbent Democratic Members of the Ohio House of Representatives. D. 47 at 5, 8; D. 16 at 2-3. The remaining Appellees are largely Democratic party officials who were recruited to serve as plaintiffs in this case. See, e.g., D. 74 at 5, 8, 11; D. 77 at 10-11, 23, 28; D. 78 at 39-40. Five of these plaintiffs are African-Americans, including incumbent Democrat Representative Mallory, who is the Majority Floor Leader of the Ohio House of Representatives and President of BEDO. D. 47 at 8-9.

1991. D. 13. Appellants had not yet filed an answer in the case, and under Fed.R.Civ.P. 12(a), were not required to do so before November 21, 1991. On November 22, 1991, Judge Dowd conducted a status conference and advised counsel that evidence was to be submitted by affidavit or deposition. D. 28. The Court indicated that it would hear no live testimony.

Over Appellants' objection to the lack of opportunity to present live testimony, D. 95, the case was heard by the district court on December 3 and 17, 1991. D. 46, 118; J.A. 3, 4. Following opening arguments on December 3, 1991, each side was allowed only three hours on December 17, 1991, in which to present its case. D. 48 at 123.

Dr. Gary King, Professor of Government at Harvard University and Director of the Harvard Data Center, testified both in his deposition and, on December 17 1991, in court that he had performed a bivariate ecological regression analysis. J.A. 220, 245-46. From that analysis, he determined that a significant degree of racially polarized voting existed in Ohio's urban counties. J.A. 221-24, 246-47. Dr. King further testified that the plan adopted by the Board had a partisan bias of zero, *i.e.*, was biased in favor of neither political party, while the proposed plan submitted by Appellees Ferguson and Quilter was biased in favor of Democrats and the proposed plan submitted by the Ohio Republican Party was biased in favor of Republicans. J.A. 217-18, 240-44.[18]

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[18] In reaching this conclusion, Dr. King analyzed over 200 presidential, congressional, general assembly, statewide office, and local races by precinct. *Findings and Conclusions*, App. at 193a (Ohio Apportionment Board Feb. 18, 1992); D. 151, Exs. 92-93; J.A. 220-21, 248. Appellees' expert, Gordon Henderson, on the other hand, analyzed only eleven 1990 Ohio House races in districts currently served by minority incumbents. J.A. 143. Henderson presented no support for his regression analysis and provided no standard deviations. *Findings and Conclusions*, App. at 191a (Ohio Apportionment Board Feb. 18, 1991).

On January 31, 1992, the district court issued an Opinion and Order. A majority concluded that as a matter of federal law, Appellants were not permitted to create minority controlled state legislative districts without first "justifying" their creation under § 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, i.e., establishing that the state legislative districts had diluted minority voting strength in the past, and that the creation of minority controlled districts was "justified" under the "totality of the circumstances" test of *Thornburg v. Gingles*, 478 U.S. 30 (1986).[19] The district court, in essence, held that the burden of proof rested not on the plaintiffs attacking the new districts as diluting minority voting strength under § 2 of the Voting Rights Act, see *Thornburg v. Gingles*, *supra*, but rather on the apportioning officials to show that the prior districts did dilute minority voting strength:

> Accordingly, we find that no adequate totality of the circumstances analysis was performed by the Board. In the absence of such an analysis, there can be no reliable finding of a violation [of the Voting Rights Act]. In the absence of a violation, there was no legal justification for the Board's "remedy" in the form of the wholesale creation of majority-minority districts. Without such a justification, the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act.

Quilter v. Voinovich, App. at 14a (N.D.Ohio Jan. 31, 1992). Judge Dowd dissented, finding that Plaintiffs

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[19] Although the district court suggested that the plan was invalid because Tilling had created minority controlled districts "wherever possible," see e.g., *Quilter v. Voinovich*, App. at 9a (N.D.Ohio Jan. 31, 1992); *Quilter v. Voinovich*, App. at 131a (N.D.Ohio March 19, 1992), the court does acknowledge that a totality-of-the-circumstances analysis was done. *Quilter v. Voinovich*, App. at 11a-14a (N.D.Ohio Jan. 31, 1992). The crux of the district court's decision was that the analysis performed *prior to redistricting* was largely informal and, in the district court's view, insufficient. *Id.* The district court majority made no reference to the extensive testimony of Dr. King.

failed to satisfy *their* burden of proof that the 1991 Ohio plan of apportionment diluted minority voting strength. On February 3, 1992, Judge Dowd issued "Appendix 2" to his dissenting opinion, an appendix consisting of detailed fact findings supporting his dissent. App. 47a.

Appellants, expressly reserving their argument that the district court's Opinion and Order of January 31, 1992, was contrary to law, reconvened the Apportionment Board for the purpose of receiving evidence, from both the Board's majority and its minority members, concerning the totality of the circumstances justifying the creation of minority controlled districts under the 1991 plan of apportionment. D. 147, Ex. B at 13. At the conclusion of the February 18, 1992, session of the Apportionment Board, the Board, by a three-to-two vote, adopted Findings and Conclusions stating that the evidence received "justified" the Board's creation of minority controlled state legislative districts. D. 147, Ex. C at 76-77; App. 160a.

The Apportionment Board further took the opportunity on remand to make a series of technical corrections to the plan as directed by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). D. 147, Ex. C at 59; App. 258a-259a. Those technical corrections, which largely involved reuniting split political subdivisions, see D. 192, affected the minority populations in some of the districts. As set forth in the Board's Findings and Conclusions, the technical corrections resulted in a reduction from eight to five minority controlled house districts, i.e., districts with a minority voting age population over 50%, *an increase of only one minority controlled district from the 1981 plan of apportionment*. App. 260a-263a. The plan as amended was labeled as "Amendment D." App. 258a-259a.[20]

[20] The 1981 plan of apportionment contained house districts in Cuyahoga County with a black population of 94.67%, 90.05%, and 74.8% of total population; and in Hamilton County with a black

Dr. King testified at both the February 11 and 18 sessions of the Apportionment Board that legally significant racial bloc voting existed in Ohio. J.A. 254, 266. In his presentation to the Board on February 11, 1992, he included a statistical analysis done after his original court testimony showing the advantage of minority incumbent state legislators over their election opponents. J.A. 259-62. This analysis supported the relatively modest increase in minority population in several of these incumbents districts. J.A. 260. Dr. King also testified that the plan, as amended, *i.e.*, "Amendment D," retained its partisan bias of zero. J.A. 260-61.

On March 10, 1992, the district court, in a two and one-half page decision and again by a two-to-one vote, ruled that Appellants had failed to "justify" the creation of minority controlled districts, *i.e.*, four districts in Cuyahoga County and one district in Hamilton County, despite the fact that the amended plan contained only one minority controlled district more than the 1981 plan of apportionment. See *ante* pp. 17-18 & n.20; App. 260a-263a. In one sentence, and without explanation, the court also found a violation of the Fifteenth Amendment to the United States Constitution:

> As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan

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population of 53.20% of total population. "Amendment C" contained districts in Cuyahoga County with a black voting age population ("VAP") of 63.42%, 65.13%, 61.41%, and 58.36% of total VAP; in Franklin County with a black VAP of 50.30%; in Hamilton County with a black VAP of 56.83% and 52.60%; and in Montgomery County with a black VAP of 50.70%. "Amendment D" contained districts in Cuyahoga County with a black VAP of 63.42%, 65.13%, 61.41%, and 58.36%; and in Hamilton County with a black VAP of 52.72%. A complete listing of the percentages of black population under the various plans, including the plan proposed by Appellees Ferguson and Quilter, which contained six minority controlled districts, appears at App. 177a-178a and 260a-263a.

> as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, App. at 119a (N.D. Ohio March 10, 1992) (*per curiam*). Consequently, the court ruled that the 1991 plan of apportionment was unlawful and ordered that a special master be appointed to redraw Ohio's state legislative districts. The district court majority also enjoined the May 5, 1992 Ohio primary election. Judge Dowd again dissented.

On March 11, 1992, Appellants filed their Notice of Appeal to this Court in the district court, App. 149a, and moved the district court to stay its Order of March 10, 1992. The district court, in an order issued on March 19, 1992, denied the motion for a stay of its March 10, 1992 Order. App. 127a. In this order, the majority restated and elaborated upon the rationale of its earlier decisions. In addition, the court went on in Part V of its decision to find that the 1991 plan of apportionment was also violative of the Fourteenth Amendment to the United States Constitution. *Quilter v. Voinovich*, App. at 146a (N.D. Ohio March 19, 1992) (*per curiam*). Accordingly, Appellants also noticed their appeal from the March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the district court. App. 156a. Appellants also noticed their appeal from the March 31, 1992 Order fixing September 8, 1992, as the primary date for members of the Ohio General Assembly. App. 325a.

On April 20, 1992, this Court stayed the March 10, 1992 and the March 31, 1992 orders of the district court. *Voinovich v. Quilter*, 112 S. Ct. 1663 (1992). Probable jurisdiction was noted on June 1, 1992. *Voinovich v. Ferguson*, 112 S. Ct. 2299 (1992). The primary election for members of the Ohio General Assembly was held on June 2, 1992. See *Quilter v. Voinovich*, J.A. 333 (N.D. Ohio May 5, 1992).[21]

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[21] The district court's May 5, 1992 opinion was issued in response to Appellees' attempts to further delay the primary election even

SUMMARY OF ARGUMENT

1. State legislative redistricting is primarily a state function, and federal courts must respect a state's policies and preferences regarding its own reapportionment. The district court's decision in this case shifts the burden of proof from plaintiffs alleging minority vote dilution to state apportioning officials by requiring state officials to conduct a totality of circumstances analysis, see *Thornburg v. Gingles*, 478 U.S. 30 (1986), prior to redistricting and, in effect, to find a Voting Rights Act violation prior to the creation of any minority controlled districts. This shifting of the burden of proof impermissibly encroaches upon the state's exercise of its legitimate discretion to avoid the dilution of minority voting strength.

Furthermore, under the district court's opinion, minorities are *per se* unlawfully "packed" into minority controlled legislative districts whenever it would be possible to elect a minority candidate with less than a majority of minority population. This aspect of the district court's opinion would itself require a state to *maximize* minority voting strength.

Finally, the district court's holding that race may not be considered by state officials in their efforts to avoid

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after the stay order issued by this Court on April 20, 1992. Following the issuance of that order, Appellees returned to the district court claiming that the primary election must be conducted under "Amendment C" rather than "Amendment D," *i.e.*, the 1991 plan of apportionment as technically amended, despite the fact that "Amendment C" was defective under the Ohio Constitution. D. 181. The district court agreed with Appellants that the primary election would be conducted under "Amendment D."

The anomaly of Appellees' position in this case is exposed by their attempt to require the primary election to be conducted under "Amendment C." On the one hand, they asserted that Appellants violated the Voting Rights Act by creating *too many* minority controlled districts, while on the other hand, they attempted to require the primary election to proceed under "Amendment C," which contained eight minority controlled districts, rather than "Amendment D," which contained only five minority controlled districts.

minority vote dilution is contrary to every decision construing § 2 of the Voting Rights Act.

2. Even if Appellants were required to "justify" their creation of minority controlled districts prior to their adoption, the overwhelming evidence before the Apportionment Board supported the creation of the five such districts contained in "Amendment D." Based upon this evidence, the Board concluded that the minorities in these districts were sufficiently large and geographically compact; that African-American voters in these districts are politically cohesive; that significant racial bloc voting existed in these districts; and that the other "totalities of the circumstances" factors supported their creation.

3. The district court's appointment of a special master to redraw Ohio's state legislative boundaries encroaches upon the discretion which a state must be afforded to redistrict its own legislature. The district court failed to give the Apportionment Board a reasonable opportunity to adopt a substitute plan prior to the appointment of the special master.

4. The district court erroneously concluded that the 1991 plan of apportionment violated the Fifteenth Amendment. There was a complete lack of evidence that the Board adopted the plan *because* of its adverse impact upon minorities, or that plaintiffs suffered any injury under the plan.

5. The district court erroneously found that the plan violated the Fourteenth Amendment. State legislative districts may have a total deviation in excess of 10% if that deviation is justified by adherence to a rational state policy. The district court failed to analyze the deviations in the case at bar under this test. The small deviation in excess of 10% in Ohio's legislative districts is supported by the Apportionment Board's rational policy of respecting county boundaries.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS.

In its opinion of January 31, 1992, the district court held that the Apportionment Board could not implement the state policy of attempting to avoid the dilution of minority voting strength in redistricting without first proving that the prior plan violated the Voting Rights Act. The Board's plan itself was held to violate § 2 of the Act because, in the district court's view, the Appellants had not properly conducted the analysis that this Court prescribed for use when a redistricting plan is challenged under that provision. *Thornburg v. Gingles*, 478 U.S. 30 (1986). This determination was erroneous because, as noted by Judge Dowd, the *Thornburg* analysis is not a prerequisite to redistricting. *Quilter v. Voinovich*, App. at 31a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting).[22] See also *DeGrandy v. Wetherell*, —— F. Supp. ——, 1992 WL 145189, slip op. at *6 (N.D. Fla. May 29, 1992) ("*Gingles*, while helpful, is not dispositive of this case because this case does not involve a traditional section 2 challenge to an existing plan."); *Fonfara v. Reapportionment Comm'n*, 222 Conn. 166 (1992) (rejecting argument that state reapportionment commission was required to prove "applicability of the Voting Rights Act" prior to redistricting). The district court, in effect, relieved the plaintiffs of the burden of showing minority vote dilution and shifted the burden to defendants by requiring them to show a past violation of § 2 of the

[22] The legislative history of the 1982 amendments to the Voting Rights Act supports Judge Dowd's observation. Congress continually referred to the totality of the circumstances or "results tests" as a vehicle for *plaintiffs* alleging minority vote dilution to attack district boundaries, not as an analysis to be conducted by state officials as a prerequisite to their redistricting. See generally S.Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code Cong. & Admin. News 177.

Voting Rights Act and or that their redistricting plan does not presently violate § 2.[23]

This Court long ago firmly established "that 'reapportionment is primarily a matter for legislative consideration and determination . . . .' We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment." *White v. Weiser*, 412 U.S. 783, 794-95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)) (citations omitted). A federal court should respect the "policies and preferences" of a state regarding its own reapportionment, so long as those policies and preferences are not in violation of federal law. *White*, 412 U.S. at 795.

The district court in the case at bar, by shifting the burden of proof to state apportioning officials to "justify" their reapportionment in the first instance, completely disregarded this Court's well-established admonition that reapportionment is a *state* function. The district court's decision placed a significant burden upon state apportioning officials to prove that their plan fully complies with the federal Voting Rights Act, relieving an allegedly

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[23] In its March 19, 1992 Order, the district court may have attempted to back away from this position, *Quilter v. Voinovich*, App. at 130a-131a (N.D.Ohio March 19, 1992) (*per curiam*), but later in that same opinion, the court again held that apportioning officials must first conduct a totality of the circumstances analysis prior to any attempt to avoid minority vote dilution:

> If a federal trial court, trained in fact finding and expert at legal analysis, is required to make a "searching practical evaluation of past and present reality" and an "intensely local appraisal of the design and impact of the contested electoral mechanisms," it would seem to follow, a fortiori, that a Board of laypersons, politically motivated, should not be held to a lesser standard. *Whether such a Board is competent in the first instance to make the necessary totalities evaluation required by the Voting Rights Act is, of course, an issue that is open to serious challenge, but one that we have answered in the affirmative.*

App. at 140a (emphasis added) (citations omitted).

aggrieved plaintiff class—in this case a class purportedly consisting of Democrats and minorities, D. 49—from any burden to show that the plan, as drawn, results in dilution of its voting strength.

As evidenced by the district court's opinions of January 31, 1992, and March 19, 1992, the burden placed upon state apportioning officials by the district court majority is a heavy one, requiring a formal and exhaustive statistical analysis prior to any state legislative reapportionment. Neither § 2 itself nor its legislative history contains the slightest indication that Congress intended to place such an extraordinary and inappropriate burden upon state officials. The district court has, in effect, ruled that the Apportionment Board must function as a quasi-judicial body, a function not conferred upon the Board by the Ohio Constitution. See *ante* p. 23 & n.23. Given that there are no plaintiffs or defendants before the Apportionment Board, the district court's decision would require the Board to adjudicate hypothetical legal claims.

The district court has, in effect, subjected non-§ 5 states to a more rigorous procedure than that imposed on § 5 states, i.e., states in which "the inability of minorities to participate equally in electoral processes has already been proven by the legislative findings of Congress," *Quilter v. Voinovich*, App. at 136a (N.D.Ohio March 19, 1992) (*per curiam*), and whose reapportionments must be pre-cleared by the Justice Department. Surely, Congress would not have placed this burden upon non-§ 5 states without indicating that it was doing so.

The district court supports its decision to place this burden upon Appellants by referring to Appellants' actions as deliberately creating minority controlled districts "wherever possible." As noted above, this is a mischaracterization of the process followed in drafting the 1991 plan of apportionment. The position consistently taken by Appellants throughout the process of drafting the

plan has been that § 2 of the Voting Rights Act does not, *per se*, require or prohibit the creation of minority controlled districts. *Findings and Conclusions*, App. at 270a (Ohio Apportionment Board Feb. 18, 1992).

Indeed, had Appellants taken the view that the Voting Rights Act required the *maximization* of minority voting strength they would, as noted by Judge Dowd, have drawn districts with the lowest percentage of black population necessary to elect a black member of the Ohio House of Representatives. *Quilter v. Voinovich*, App. at 35a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting). Under the district court opinion, minorities are *per se* unlawfully "packed" into a minority controlled legislative district whenever it would be possible to elect a minority candidate with less than a majority of minority population in that district. The district court ruled that minority voters in excess of that number were "wasted," and thus should be placed in another district where they may result in additional influence for the minority community. *Quilter v. Voinovich*, App. at 8a (N.D.Ohio, Jan. 31, 1992). Accordingly, it is the district court's decision, not the process of drafting the 1991 plan of apportionment, which would require the *maximization* of minority voting strength.

From the outset of the reapportionment process, which began nearly one year prior to the adoption of the plan in October, 1991, Tilling consulted with the Ohio NAACP and with other minority leaders throughout the state to achieve a consensus on the configuration of house and senate districts in Ohio's urban counties. *Findings and Conclusions*, App. at 269a-270a (Ohio Apportionment Board Feb. 18, 1992). In an effort to open up the reapportionment process, the Board, in the two months prior to the adoption of a plan, held an unprecedented series of public hearings throughout the state to receive public input on the drafting of the new plan. *Findings and Conclusions*, App. at 163a (Ohio Apportionment

Board Feb. 18, 1992). Indeed, as conveniently ignored by the majority of the district court, Tilling's and the NAACP's original proposed plans are virtually identical with respect to districts in Ohio's urban counties. The only changes in Tilling's plan, other than the technical corrections made October 3, 1991, and February 18, 1992, were in Cuyahoga County and were the result of consultations with the NAACP and other minority groups.

With this background in mind, it is not surprising that this case appears to have been commenced primarily to preserve the lopsided majority that incumbent white Democrats now hold in the Ohio House of Representatives. See *Appellees' Motion to Dismiss or Affirm* at 19-20 ("Tilling knew that black voters in Ohio voted 85-95% Democratic and that wherever blacks were 13% or more of the population, Democrats were inevitably elected."),[24] Floyd Johnson of the Ohio NAACP decried the Appellees' efforts to "use" black voters to bolster the incumbencies of white Democrats as "plantation politics" which could no longer be tolerated. D. 147, Ex. B at 62. See *DeGrandy v. Wetherell*, —— F.Supp. ——, 1992 WL 145189 (N.D. Fla. May 29, 1992).[25]

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[24] Appellees presented a claim of political gerrymandering to the district court, which did not find that Appellees had established such a claim.

[25] The district court in *DeGrandy, supra*, rejected a similar argument:

> Proponents of the plans which include influence districts argue that it is more desirable for African Americans to have influence in several districts rather than constituting a majority in only two districts.
>
> We believe the second approach, which fractures the African American community into influence districts, would merely continue the past dilution of minority voting strength. * * * The approach of fracturing the African American community in order to create influence districts does not further Congress's intent of completely remedying the prior dilution of minority voting strength and providing a meaningful opportunity to participate in the political process.

DeGrandy, slip op. at *9 (citations omitted).

The district court's decision of January 31, 1992, that race may not be considered in a state's efforts to avoid the dilution of minority voting strength during redistricting, is contrary to every decision relating to the Voting Rights Act. For example, in *United Jewish Organizations, Inc. v. Carey*, 430 U.S. 144 (1977), this Court held that redistricting officials satisfied their obligation under § 5, 42 U.S.C. § 1973c, "where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority," 430 U.S. at 159, and that "compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines." *Id.* The Court approved the use of racial criteria in drawing district lines under § 5 of the Voting Rights Act by noting that "the Constitution does not prevent a State subject to the Voting Rights Act from *deliberately creating or preserving black majorities in particular districts* in order to ensure that its reapportionment plan complies with § 5." 430 U.S. at 161 (emphasis added). The Court further noted that state officials need not confine their use of racial criteria to the elimination of past discriminatory reapportionment, 430 U.S. at 161, and that a state was permitted to consider racial criteria in an effort to comply with the Voting Rights Act. 430 U.S. at 167-68.

Similarly, in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), the court concluded that "[t]he deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes. Such districting, whether worked by a court or by a political entity in the first instance, does not violate the Constitution." 918 F.2d at 776.

In *Wilson v. Eu*, 1 Cal.4th 707, 4 Cal.Rptr.2d 379 (1992), the California Supreme Court adopted redistricting plans for the California Assembly, Senate and Congressional delegation after the state legislature's failure to enact plans in time for the 1992 elections. The court,

relying upon *United Jewish Organizations*, *supra*, and *Garza*, *supra*, adopted its special masters' report, which "attempted to reasonably accommodate the interests of every 'functionally, geographically compact' minority group of sufficient voting strength to constitute a majority in a single-member district." 4 Cal.Rptr.2d at 383. The California special masters' plan sought to avoid a successful § 2 challenge simply by avoiding the fragmenting of any large and compact minority population. 4 Cal. Rptr.2d at 397-99. The California Supreme Court's decision that apportioning officials may create minority controlled districts in order to avoid a successful Voting Rights Act challenge is consistent with this Court's holding in *United Jewish Organizations*, *supra*.

In *Hastert v. State Bd. of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), the United States District Court for the Northern District of Illinois concluded that "[r]acial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act." 777 F.Supp. at 650-51 (citations omitted). Similarly, the United States District Court for the Western District of Texas, in refusing to issue a preliminary injunction against the state legislature's Congressional redistricting plan, approved of the use of racial criteria in drawing districts. *Terrazas v. Slagle*, 789 F.Supp. 828, App. at 302a (W.D.Tex. 1991), *aff'd*, 112 S.Ct. 3019 (1992).[26] See also *Jeffers v. Clinton*, 730 F.Supp. 196, 215 (E.D.Ark. 1989), *aff'd*, 111 S.Ct. 662 (1991); *DeGrandy v. Wethercell*, —— F.Supp. ——, 1992 WL 145189, slip op. at *8-9 (N.D.Fla. May 29, 1992); *Prosser v. Election Bd.*, —— F.Supp. ——, 1992 WL 124378, slip op. at *9 (W.D.Wisc. June 2, 1992); *In re Petition of Stephan*,

[26] The *Terrazas* Court found that the state legislature's plan for redistricting the state house and senate violated the Voting Rights Act by not creating enough Hispanic and African-American districts, and accordingly enjoined implementation of that plan.

—— P.2d ——, 1992 WL 165961, slip op. at *10-12 (Kan. July 10, 1992); *Cotlow v. Growe*, No. C8-91-985, App. at 287a, 291a (Minn. Redistricting Panel Nov. 21, 1991); *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, —— A.2d ——, 1992 WL 100392, slip op. at *13 (Pa. Feb. 14, 1992), *cert. denied*, 112 S.Ct. 2998 (1992).

The district court, contrary to every court to consider the issue, has told the state that it cannot exercise its legitimate discretion to avoid minority vote dilution without first satisfying a federal court that, in doing so, it is remedying a preexisting violation of the Voting Rights Act. This serious intrusion on state authority should not be allowed to stand.

II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT DEFENDANTS FAILED, UNDER THE TOTALITY OF THE CIRCUMSTANCES TEST, TO JUSTIFY THEIR CREATION OF MINORITY CONTROLLED DISTRICTS IN THE 1991 PLAN OF APPORTIONMENT.

In its Order of March 10, 1992, the district court compounded its error of January 31, 1992, by concluding, against the overwhelming weight of evidence, that Appellants had failed to "justify" their creation of minority controlled districts, under the totality of the circumstances test of *Thornburg v. Gingles*, *supra*. As Judge Dowd noted, the evidence "justifying" the creation of minority controlled districts was overwhelming. *Quilter v. Voinovich*, App. at 122a (N.D. Ohio March 10 1992) (Dowd, J., dissenting), yet the lower court majority ruled that Appellants had failed to satisfy their burden of proof. See *Quilter v. Voinovich*, App. at 119a (N.D.Ohio March 10, 1992) (*per curiam*) ("Accordingly, the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965.").

The lower court not only ruled that the Board failed to satisfy its *burden* of proof, but by according no deference to the Board's exhaustive findings, it held the

Board to an improperly stringent *standard* of proof. Even if this Court were to rule that a state must "justify" its creation of minority controlled districts prior to their adoption, it should nevertheless hold that the Board's findings and conclusions are entitled to deference and that the Board did indeed justify its creation of the five minority controlled districts at issue in this case. *See Kuvicier v. Daggett*, 462 U.S. 725, 759 (1983) (Stevens, J., concurring) ("[I]f neutral decisionmakers developed the plan on the basis of neutral criteria, if there was an adequate opportunity for the presentation and consideration of differing points of view, and if the guidelines used in selecting a plan were explained, a strong presumption of validity should attach to whatever plan such a process produced."). *See also Kansas ex rel. Stephan v. Graves*, —— F.Supp. ——, 1992 WL 152251, slip op. at *2 (D.Kan. June 24, 1992) ("[D]eference to a decision made by the state legislative and executive branches in [redistricting], which is so necessarily political, is an important linchpin of judicial review."); *In re Reapportionment of the Colorado Gen. Assembly*, 828 P.2d 185, 189-90, 192 (Colo. 1992) (state supreme court noted that it must accord a presumption of good faith and validity to plan adopted by the state reapportionment commission and its resolution of Voting Rights Act issues); *Fontana v. Reapportionment Comm'n*, 222 Conn. 166 (1992).

The district court was clear in its opinion of March 10, 1992, that the only purpose of its January 31, 1992, remand to the Apportionment Board was for the Board to "show justification under the totality of the circumstances test for the majority-minority districts or submit a revised plan." *Quilter v. Voinovich*, App. at 118a (N.D.Ohio March 10, 1992). Prior to remand, and therefore prior to the adoption of the technical amendments contained in "Amendment D," the Board had created only eight minority controlled districts. App. 260a-263a. During the course of hearings on remand, the Board received volumes of evidence and adopted exhaustive findings and conclusions

clearly establishing that both the eight minority controlled districts in "Amendment C" and or the five minority controlled districts in "Amendment D" were warranted under the totality of the circumstances test of *Thornburg v. Gingles, supra*.

In *Thornburg*, this Court set forth the analysis lower courts should use in evaluating *plaintiffs'* claims of minority vote dilution under § 2 of the Voting Rights Act. The Court noted that there are essentialy three preconditions to such a claim:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. * * * Second, the minority group must be able to show that it is politically cohesive. * * * Third, the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Thornburg, 478 U.S. at 50-51 (citations omitted). The Court went on to note that if plaintiffs establish these preconditions, a *court* should consider the other factors listed in the Senate Report accompanying the 1982 amendments to the Voting Rights Act. See S. Rep. 97-417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. Code Cong. & Admin. News 177.[27]

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[27] Those factors include: the history of voting-related discrimination in the state; the extent to which the state has used voting practices or procedures which tend to enhance the opportunity for discrimination against minorities; the exclusion of members of the minority group from the candidate slating process; the extent to which minorities bear the effects of past discrimination in areas such as education, employment, and health which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; the extent to which members of the minority group have been elected to public

Analyzed within this framework, it is clear—even if the position of Judge Dowd and of the Appellants is rejected and the apportioning defendants do bear the burden of proof—that the creation of the five minority controlled districts declared invalid by the district court was "justified." Initially, it must be noted that contrary to the district court's opinion, the state need not support the creation of such districts by performing a formal analysis. *Hall v. Holder*, 955 F.2d 1563, 1570-71 (11th Cir. 1992), *petition for cert. filed*, 60 USLW 3881 (June 16, 1992). *See also Westlego Citizens for Better Gov't v. City of Westlego*, 946 F.2d 1109, 1118 n.12 (5th Cir. 1991) (statistical evidence of racial polarization is not necessary to prove cohesion of minority group). As discussed above, Tilling informally concluded prior to the adoption of "Amendment C" that, based upon his own extensive experience in Ohio politics, the creation of such districts was warranted under *Thornburg*. See *ante* at pp. 8-9. Nevertheless, the Board performed an exhaustive formal analysis following the district court's January 31 1992 remand, and concluded that the overwhelming evidence did indeed support the creation of the five minority districts contained in "Amendment D."

A. Size and Compactness of African-American Populations.

It is undisputed that Ohio's African-American population is concentrated in its eight urban counties. *Quilter v. Voinovich*, App. at 77a-78a (N.D.Ohio Feb. 3, 1992) (Dowd, J., dissenting). Indeed, as evidenced by the fact that "Amendment C" contained eight minority controlled districts (and, as originally proposed, contained nine), it is clear that more minority controlled districts, containing compact minority population, could have been created absent compliance with the Ohio Constitution.

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office; the responsiveness of elected officials to the particularized needs of the minority community; and the policy underlying the state's district lines. *Thornburg*, 478 U.S. at 44-45.

B. Cohesiveness of African-Americans and Racial Bloc Voting.

In *Thornburg*, this Court noted that the degree of racial bloc voting which is "legally significant" varies from district to district. 478 U.S. at 55-56. Generally, however, the political cohesiveness of a minority group, and thus racial bloc voting, may be established by showing "that a significant number of minority group members usually vote for the same candidates . . . . And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Thornburg*, 478 U.S. at 56. The Court also noted that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." 478 U.S. at 57. See also *Clark v. Edwards*, 725 F.Supp. 285 (M.D.La. 1988), *reaffirmed*, 777 F.Supp. 471 (1991), *appeal dismissed*, 958 F.2d 614 (5th Cir. 1992); *DeBaca v. County of San Diego*, —— F.Supp. ——, 1992 WL 114049, slip op. at *10 (S.D.Cal. May 11, 1992). This Court also endorsed the consideration of the benefits of running as an incumbent in determining whether racial bloc voting exists. *Thornburg*, 478 U.S. at 60. See also *Collins v. City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989), *cert. denied*, 111 S.Ct. 340 (1990); *Harvell v. Ladd*, 958 F.2d 226, 230 (8th Cir. 1992).

In the case at bar, Dr. King, one of the foremost experts on racial bloc voting, extensively testified in his deposition, before the district court, and before the Apportionment Board, that racial bloc voting existed in all of the districts at issue in this case. J.A. 224, 247. He analyzed over two hundred elections by precinct from 1982 through 1990 in reaching this conclusion. J.A. 245-48. He conducted a bivariate ecological regression analysis, J.A. 220, 245, and confirmed the results of that

analysis by conducting a homogeneous precinct analysis and an analysis based upon an aggregated compound multinominal model. J.A. 222-24.

Dr. King's analysis confirmed that significant racial bloc voting existed in all Ohio House districts with significant minority population. Although this analysis did indeed show that African-American legislators were elected with some white crossover votes, the degree of racial bloc voting was a very significant figure of 44.1, i.e., the percentage of blacks voting for black candidates in the relevant districts exceeded the percentage of whites voting for black candidates in those districts by 44.1. J.A. 221, 251-52.

In its *Findings and Conclusions*, the Apportionment Board rejected the testimony of Appellees' expert, Gordon Henderson. Unlike Dr. King, who has extensively published scholarly articles on racial bloc voting and who has received numerous grants and awards, App. 192a-193a, Henderson has never written anywhere on the topics of apportionment, redistricting, gerrymandering, racial bloc voting or minority voting rights. App. 193a. Contrary to this Court's observation that several elections must be analyzed to determine whether there exists a probative pattern of racial bloc voting, *Thornburg*, 478 U.S. at 57, Henderson analyzed only election results for the 1990 elections in the eleven districts currently served by incumbent black legislators, and the results in one district, in Cuyahoga County, in the 1988 Democratic presidential primary. J.A. 143, 172. Henderson reviewed no state legislative primary election data to determine whether the Democratic candidate receiving the majority of African-American votes in the general election was the minority community's preferred candidate. J.A. 172. Dr. King testified that Henderson's analysis was not statistically reasonable. J.A. 247-49. Accordingly, the Apportionment Board concluded that Henderson's statistical evidence testimony was not credible with regard to the issues before the Board. *Findings and Conclusions*, App. at 206a (Ohio Apportionment Bd. Feb. 18, 1992).

Confident that a pattern of bloc voting had been shown, the Board considered the other totality of circumstances factors.

C. History of Official Discrimination.

The Apportionment Board noted that there had been a history of official discrimination against minorities in Ohio. App. 195a-205a. Most recently, the 1981 apportionment plan was ruled to have violated § 2 of the Voting Rights Act and the Fifteenth Amendment with respect to the division of the African-American community in Mahoning County. *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991). Until 1991, the reapportionment process had not been open to participation by minorities. D. 70 at 95. In addition, former Governor Richard F. Celeste and former Secretary of State Sherrod Brown conceded in litigation that the at-large election of municipal court judges in Hamilton County violated § 2 of the Voting Rights Act. *Mallory v. Eyrich*, 922 F.2d 1273 (6th Cir. 1991).

The Board also cited to 25 other reported judicial decisions involving instances in which the state or its political subdivisions had been found guilty of discrimination against minorities in maintaining segregated school systems, in the hiring and promotion of employees, in the award of state contracts, in public housing and zoning, and in maintaining segregated public facilities. App. 196a-200a. See *Jordan v. Winter*, 604 F.Supp. 807, 811-12 (N.D.Miss. 1984) (*per curiam*) (relying upon reported judicial decisions to establish history of past discrimination), *aff'd*, 469 U.S. 1002 (1984). Dana Mattison, the executive Director of BEDO, and Floyd Johnson testified concerning other "unreported" instances of official discrimination. App. at 202a-204a.

D. Barriers to Effective Minority Participation.

Mattison and Johnson both testified as to the barriers to effective minority participation in the democratic process in Ohio. App. 206a-210a. Such barriers include the candidate screening process within the Democratic party

and the lack of majority financial support for minority candidates.

E. Other Factors.

The Board also concluded that minorities in Ohio presently suffer the effects of past discrimination in employment, education, income, and housing, App. 210a-215a;[28] that past political campaigns have been characterized by overt or subtle racial appeals, App. 215a-218a;[29] and that minorities have not been particularly successful when running for public office, App. 219a-222a.[30]

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[28] Unemployment rates for blacks have consistently been from two to four times as high as those for whites in Ohio's urban counties since at least 1979. App. 211a-212a. Black mean household income has been significantly less than that for whites. App. 213a. Over four times the percentage of blacks live below the poverty level than do whites. App. 213a. A significantly higher percentage of blacks than whites have not completed high school and have no college education. App. 214a. The value of whites' housing is substantially greater than that of blacks' housing in all of Ohio's urban counties. Blacks are also substantially disadvantaged in health care. *Final Report*, Governor's Task Force on Black and Minority Health (1987), D. 153, Ex. 107; *Ohio's African-American Males: A Call to Action*, Report of Governor's Commission on Socially Disadvantaged Black Males (1990), D. 153, Ex. 106.

[29] Tilling noted that racial appeals played a significant role in numerous elections pitting black and white candidates against each other, including Columbus and Cleveland mayoral races, a Columbus City Attorney race, an Ohio Secretary of State race, and the Cuyahoga County Clerk of Courts race. Mattison and Johnson both testified that race is an issue in all elections where one of the candidates is black.

[30] Despite several attempts, no minority person has ever been elected to statewide office in Ohio. App. 219a. With the exception of Cuyahoga County, minorities have had little success in county and city-wide elections in Ohio's urban counties. For example, only one black has been elected county commissioner in an urban county other than Cuyahoga County since 1984. App. 220a-226a. Although there are eleven incumbent minority Ohio House members, several of those members initially received the advantage of running as an incumbent by being appointed to fill vacant positions. App. 221a. Black voter turnout in these legislators' districts ranged from 12.63% to 36.33% in 1990. App. 223a.

From the foregoing, it is clear that the Apportionment Board's creation of five minority-controlled districts in the 1991 plan of apportionment was justified by the substantial weight of the evidence. Accordingly, the district court's conclusion to the contrary cannot withstand scrutiny.[31]

III. A DISTRICT COURT MAY NOT APPOINT A SPECIAL MASTER TO REDRAW STATE LEGISLATIVE DISTRICTS WITHOUT FIRST AFFORDING THE STATE'S APPORTIONING OFFICIALS A REASONABLE OPPORTUNITY TO ADOPT A SUBSTITUTE PLAN.

In its decision of March 10, 1992, the district court appointed a special master to draw a new plan of apportionment for the members of the Ohio General Assembly. That appointment exceeds the clear limitations imposed by this Court on a district court's remedial powers in reapportionment cases:

> The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt. *When a federal court declares an existing apportionment scheme unconstitutional, it is therefore, appropriate, whenever practicable, to afford a reasonable opportunity for the legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan.* The new legislative plan, if forthcoming, will then be the governing law unless it too, is challenged and found to violate the Constitution. "[A] state's freedom of

[31] In a feeble attempt to support its finding of a § 2 violation, the district court ruled that the addition of minority population to a district represented by a minority incumbent who receives white crossover votes constituted "packing." App. 141a. The court apparently suggests that reapportionment should be based upon the incumbencies of minority legislators, an idea rejected by Tilling, D. 102 at 47-48; D. 123 at 90, 176-78, and by several courts. *Prosser*, 1992 WL 124378, slip op. at 11 ("The goal of the Voting Rights Act is to enhance the electoral power of minority voters, rather than to maximize the electoral prospects of minority incumbents."); *Major v. Treen*, 574 F. Supp. 325, 355 (E.D. La. 1983).

> choice to devise substitutes for an apportionment plan found unconstitutional, either in whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978) (citation omitted) (emphasis added). See also *Burns v. Richardson*, 384 U.S. 73, 85 (1966).

Although the district court suggested that the Apportionment Board failed *twice* to adopt a valid plan, it must be emphasized that the court, in its Opinion and Order of January 31, 1992, did *not* invalidate the 1991 plan of apportionment. Rather, the district court found insufficient evidence to support the creation of minority controlled districts in the plan. Accordingly, the Board was ordered to reconsider the plan to show "justification" for such districts. The Board did exactly that when it reconvened to receive evidence regarding the totality of the circumstances, and when it issued findings and conclusions setting forth the basis for the creation of minority controlled districts.[32]

The district court's determination on March 10, 1992—that the creation of minority controlled districts was not justified, *i.e.*, that the plan is invalid—was thus the first and only such declaration. Contrary to the clear dictates of this Court, the district court did not afford the Board a reasonable opportunity to adopt a substitute plan, which plan would "be the governing law." *Wise*, 437 U.S. at 540. In not affording the Board such an opportunity, as well as in arbitrarily fixing September 8, 1992, as the date of the primary election for members of the Ohio General Assembly, the district court encroached upon the autonomy of the state to reapportion its own state legislature—an autonomy that, as noted above, has long been recognized by this Court.[33] Accordingly, this Court should

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[32] Indeed, Appellee Ferguson agreed that the district court's January 31, 1992 opinion did not invalidate the 1991 plan of apportionment. D. 147, Ex. B at 92.

[33] At its sessions following the district court's remand of January 31, 1992, the Board considered two alternatives ("Amendment E"

reverse the district court's appointment of the special master to redraw Ohio's legislative boundaries.

IV. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT.

As previously noted, the district court found in one sentence that the 1991 plan of apportionment violated the Fifteenth Amendment:

> As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issues present, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution.

Quilter v. Voinovich, App. at 119a (N.D. Ohio March 10, 1992) (*per curiam*). The district court did not discuss the element of discriminatory motive that this Court has clearly held must be proved in order to establish a Fifteenth Amendment claim. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980) ("[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").[34] In its decision of March 10,

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and "Amendment F"). "Amendment E" reduced the relative minority population to approximately the same levels as existed under the 1981 apportionment, while "Amendment F" reduced the relative minority population in Cuyahoga County districts by creating five, rather than four, minority controlled districts within that county. The Board advised the district court that the 1991 plan as corrected, *i.e.*, "Amendment D," best satisfied the Board's totality of circumstances analysis, but that "Amendments E and F" were acceptable alternatives the court could consider. The district court considered neither of these alternatives.

[34] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court concluded that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." 446 U.S. at 71 n.17 (citation omitted). See also *Flanagan v. Gillmor*, 561 F. Supp.

1992, the district court pointed to no evidence that Appellants' creation of minority controlled districts was done with any conceivable discriminatory motive.[35]

The district court attempted to bolster its finding of a Fifteenth Amendment violation in its opinion of March 19, 1992, by asserting that alleged political motivation constituted invidious racial discrimination:

> Furthermore, the Board cannot seriously contend that it did not apply its "remedy" intentionally and for political advantage in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim.

Quilter v. Voinovich, App. at 142a-143a (N.D.Ohio March 19, 1992) (*per curiam*) (footnotes and citations omitted).[36] In its footnotes, the court pointed only to evidence (1) that Tilling drew the plan in conformity with his understanding of the requirements of the Voting Rights Act, and that in doing so he split political subdivisions in

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36, 45 (S.D.Ohio 1982) (three-judge court), *aff'd*, 467 U.S. 1223 (1984).

[35] To establish a Fifteenth Amendment claim of intentional racial discrimination, a plaintiff must prove both discriminatory motive and injury. *Garza v. County of Los Angeles*, 918 F.2d at 771 (citing *White v. Regester*, 412 U.S. 755 (1973)). The record in this case is completely devoid of any evidence of injury to plaintiffs under the 1991 plan of apportionment.

[36] The district court attempted to apply the sound holding of *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991), but overlooked two key points of that decision. The *Garza* court held that in order for political motivation to be intentional discrimination, (1) the instrument for executing that political motivation must have a dilutive effect on minority voting strength, and (2) the dilutive effect must be known to the political body making the decision. There is no proof of either of these elements in the case at bar.

apparent violation of the Ohio Constitution, and (2) that Tilling had possession of documents purporting to show how the Republicans might politically gerrymander the state's new districts. App. at 142a-143a n.8 & 9.

This "evidence" simply does not support the district court's finding of a Fifteenth Amendment violation. First, the district court ignores the fact that technical corrections were made to the plan on February 18, 1992, reuniting split political subdivisions as directed by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). See D. 192.

Second, Tilling's *mere possession* of documents suggesting that the Republicans might be able to politically gerrymander Ohio's new house and senate districts in no way supports the district court's finding that he did so. The district court referred to the documents entitled "Republican Opportunities" and "Let's Pretend," which were drafted by David Horn, a Democrat farmer from Athens County, Ohio. J.A. 99-100; D. 113 at 86, 90-91.[37] Tilling retained these documents only to compare them to his plan to show that it was politically fair. J.A. 33-34.[38] Both Horn and Tilling testified that they never spoke to each other during the reapportionment process, J.A. 35-36; D. 113 at 144, and Tilling's uncontroverted testimony was that he never used either document in preparing his plan. D. 103 at 77-78. Moreover, Dr. King testified that based upon his analysis, the Board's plan of apportionment had a partisan bias of zero, J.A. 217, 240-41, belying any assertion that it was a "Republican gerrymander." Indeed, the district court ignored, and

[37] Tilling knew Horn from working with him in a failed bipartisan effort to reform Ohio's constitutional reapportionment process by removing most of the discretion from the process and replacing it with a mathematical formula. J.A. 33; D. 103 at 77-78.

[38] This comparison became unnecessary when the Ohio Republican Party and the Democratic members of the Apportionment Board submitted plans biased in favor of their respective parties.

therefore presumably rejected, Appellees' political gerrymandering claim under the Fourteenth Amendment.

And, finally, none of the evidence referenced by the district court in any way suggests that Tilling drew the minority controlled districts "'because of' . . . [their] adverse effects upon an identifiable group" as required by this Court's decision in *City of Mobile v. Bolden*, 446 U.S. at 71 n.17. Tilling consulted with the Ohio NAACP, which fully endorsed the minority controlled districts under the 1991 plan of apportionment. *Quilter v. Voinovich*, App. at 28a (N.D.Ohio Jan. 31, 1992) (Dowd, J., dissenting). Indeed, as conveniently ignored by the majority below, the Ohio NAACP's proposed plan of apportionment for Ohio's urban counties *was substantially incorporated into the plan drafted by Appellants*. The only changes to the NAACP plan as adopted, other than the technical corrections made on February 18, 1992, were in Cuyahoga County following consultations between Appellants, the Ohio NAACP, the Black Elected Democrats of Ohio ("BEDO"), and the Black Elected Democrats of Cleveland, Ohio ("BEDCO"). All of these groups endorsed the final districts in Cuyahoga County. It is inconceivable, therefore, that Appellants adopted the 1991 plan of apportionment because of its adverse effects upon the minority community in Ohio. See *Flanagan v. Gillmor*, 561 F.Supp. at 46 ("The conclusion that no impermissible racial motivation accounted for district line drawing by the drafters of [Ohio's 1981 Congressional redistricting plan] is bolstered by the bipartisan efforts to avoid diluting black voting power in the redistricting of the northeastern Ohio area . . . .").

In light of this factual background, as well as the district court's failure to make adequate findings of discriminatory motive or injury, it is evident that the court simply eliminated discriminatory motive as an element of a Fifteenth Amendment claim. Accordingly, this Court should reverse the district court's finding of a Fifteenth Amendment violation.

V. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF THE FOURTEENTH AMENDMENT.

In its decision of March 19, 1992, denying Appellants' motion for a stay, the district court, for the first time in this proceeding, also found that the 1991 plan of apportionment violated the Fourteenth Amendment with respect to three house districts created pursuant to Article XI, §§ 9 and 10(B) of the Ohio Constitution. Those sections, expressing a state constitutional policy of designating single counties as whole house districts where reasonably possible, permit the Apportionment Board to designate a county as a house district when its population is within 10% of the ideal population. The Board created three such House districts: Ashtabula County (HD 5), Fairfield County (HD 6), and Wayne County (HD 7). *Quilter v. Voinovich*, App. at 22a (N.D. Ohio Jan. 31, 1992) (Dowd, J., dissenting). The lower court also found that one senate district (Senate District 32), which was approximately 94% of the ideal district ratio, violated the Fourteenth Amendment.[39]

The lower court's finding of a Fourteenth Amendment violation cannot be sustained. The district court, contrary to this Court's well-established analysis for such Fourteenth Amendment violations, found a violation solely because the districts were not within plus or minus 5% of the ideal population. The court said:

> Both deviations were justified, erroneously, by the need to observe county lines. It is well recognized

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[39] Ohio Supreme Court Douglas has suggested that this claim is barred by the doctrine of res judicata. *Voinovich v. Ferguson*, 63 Ohio St.3d at 209-10 (Douglas, J., concurring). The redistricting case before the Ohio Supreme Court, *Voinovich v. Ferguson*, *supra* specifically concerned whether the senate district was within Ohio Constitutional population requirements. The Ohio Supreme Court held that it was. Appellees Ferguson and Quilter, although parties to that proceeding, chose not to assert their Fourteenth Amendment claim, which claim was a compulsory counterclaim, and Justice Douglas stated that, in his view, the claim is therefore barred.

> that, under the Fourteenth Amendment, standard districting criteria, such as respect for city or county boundaries, must give way to the equal population standard if there is an unavoidable conflict. Accordingly, the Board fails to provide sufficient justification for its violation of the 10% total deviation rule.

Quilter v. Voinovich, No. 5:91CV-2219, App. at 148a (N.D.Ohio March 19, 1992) (*per curiam*) (citations omitted).

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment requires that seats in both houses of a bicameral state legislature be apportioned substantially on a population basis. See also *Davis v. Mann*, 377 U.S. 678, 690 (1964). But in that same Term, the Court said:

> [I]t is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause. Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.

Roman v. Sincock, 377 U.S. 695, 710 (1964). In this regard, the Court has noted "that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate v. Mundt*, 403 U.S. 182, 185 (1971). See also *Reynolds*, 377 U.S. at 578.

> "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." Our decisions

> have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population however, creates a prima facie case of discrimination and therefore must be justified by the State. The ultimate inquiry, therefore, is whether the legislature's plan "may reasonably be said to advance [a] rational state policy" and, if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits."

Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (citations omitted). See also *Mahan v. Howell*, 410 U.S. 315 (1973) (concluding that Virginia apportionment plan, with 16.4% total deviation, was justified by the State's established policy of maintaining the integrity of political subdivision boundaries and, therefore, was constitutional).

The district court in the case at bar failed to perform the analysis required by this Court in *Brown* and *Mahan*. Rather, the Court simply invalidated four districts, three House and one Senate, merely because they exceeded the plus or minus five percent range of Article XI, §§ 3 and 4. App. 280a and 281a.[40] The Court totally ignored the express state constitutional policy of respecting county

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[40] In the plan of apportionment as amended on February 18, 1992, i.e., "Amendment D," the largest house district, House District 20 (Cuyahoga County), has a population of 114,943, or 104.91% of the "ideal population" of 109,567, i.e., one house ratio. The smallest house district, House District 5 (Ashtabula County), has a population of 99,281, or 91.10% of the ideal, for a maximum deviation of 13.81%, i.e., 104.91% minus 91.10%. See App. 99a-103a, D. 153, Ex. 116.

The largest senate district, Senate District 1 (HD 82, HD 83 and HD 86), has a population of 343,582, or 104.53% of the ideal population of 328,700, i.e., one senate ratio. The smallest senate district, Senate District 32 (HD 66, HD 67, and HD 68), has a population of 308,942, or 93.99% of the ideal, for a maximum deviation of 10.54%, i.e., 104.53% minus 93.99%. *Id.*

boundaries by creating single county house districts where reasonably possible. See Ohio Const., Article XI, §§ 9 and 10(B); App. 283a. All three house districts invalidated by the district court were created under the authority granted by the Ohio Constitution in these sections, and pursuant to the Apportionment Board majority's express instruction to Tilling. J.A. 272-75.

Furthermore, the senate district held violative of the Fourteenth Amendment was only slightly in excess of the 5% deviation from the ideal. The configuration of that district resulted from the mandate of other state constitutional provisions which prevented the addition of population from any of the adjoining counties—an addition that would have resulted in disregarding other county boundaries. See *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). The Ohio Supreme Court declined to invalidate that senate district by adding population because to do so would have been ordering the Apportionment Board "to correct one constitutional violation by committing another." 63 Ohio St.3d at 200.

From the foregoing, it is clear that the relatively minor total deivations over 10%, 3.81% for the House and .54% for the Senate, are justified by Ohio's express constitutional policy of respecting county boundaries, a justification long acknowledged by this Court to permit deviations slightly in excess of 10%. These deviations are well within the 16.4% deviation approved by this Court in *Mahan*, *supra*, and the district court's finding of a Fourteenth Amendment violation, without performing any of the required analyses, should therefore be reversed.

CONCLUSION

For the reasons stated, Appellants respectfully request that this Court reverse the March 10, 1992, March 19, 1992, and the March 31, 1992 judgments of the district court, and remand the case to that court with instructions to enter judgment in favor of the Defendants-Appellants.

DATED: July 31, 1992

Respectfully submitted,

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APPENDIX

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D. 7 Order (assigning panel) (Nov. 7, 1991)
D. 13 Order (scheduling trial) (Nov. 14, 1991)
D. 16 Intervenors' Complaint (Nov. 8, 1991)
D. 28 Transcript of Telephone Conference (Nov. 22, 1991)
D. 46 Minutes of Proceedings (Dec. 3, 1991)
D. 47 Amended Complaint (Dec. 5, 1991)
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D. 75 Deposition of Stanley J. Aronoff (Nov. 27, 1992)
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D. 103 Deposition of James R. Tilling (Nov. 22, 1991)
D. 104 Deposition of James R. Tilling (Nov. 25, 1991)
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D. 113 Deposition of David Horn (Dec. 10, 1991)
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D. 147 Notice of Filing Record (filed Feb. 19, 1992)
Ex. B Apportionment Board Hearing Transcript (Feb. 11, 1992)
Ex. C. Apportionment Board Hearing Transcript (Feb. 18, 1992)
D. 151 Defendants' Exhibits, Volume IV (submitted at Apportionment Board Hearings of Feb. 11 and 18, 1992) (filed Feb. 19, 1992)
Ex. 92 Explanatory Listing of Items in Regression Analysis
Ex. 93 Bivariate Regression Analysis—Racial Bloc Voting
D. 153 Defendants' Exhibits, Volume VI (submitted at Apportionment Board Hearings of Feb. 11, and 18, 1992) (filed Feb. 19, 1992)

Ex. 106 *Ohio's African-American Males: A Call to Action*, Report of Governor's Commission on Socially Disadvantaged Black Males (1990)

Ex. 107 *Final Report*, Governor's Task Force on Black and Minority Health (1987)

Ex. 116 Amendment "D" to Plan of Apportionment for the Ohio House of Representatives and the Ohio Senate

D. 154 Joint Trial Exhibits (filed Feb. 19, 1992)

Ex. 1 Toledo Apportionment Board Public Hearing Transcript (August 26, 1991)

Ex. 2 Columbus Apportionment Board Public Hearing Transcript (Aug. 27, 1991)

Ex. 3 Cleveland Apportionment Board Public Hearing Transcript (Aug. 28, 1991)

Ex. 4 Mansfield Apportionment Board Public Hearing Transcript (Aug. 28, 1991)

Ex. 5 Dayton Apportionment Board Public Hearing Transcript (Aug. 29, 1991)

Ex. 6 Cincinnati Apportionment Board Public Hearing Transcript

Ex. 7 Athens Apportionment Board Public Hearing Transcript (Sept. 3, 1991)

Ex. 8 Cambridge Apportionment Board Public Hearing Transcript (Sept. 3, 1991)

Ex. 9 Canton Apportionment Board Public Hearing Transcript (Sept. 4, 1991)

Ex. 10 Youngstown Apportionment Board Public Hearing Transcript

Ex. 11 Chardon Apportionment Board Public Hearing Transcript (Sept. 5, 1991)

Ex. 12 Strongsville Apportionment Board Public Hearing Transcript (Sept. 5, 1991)

Ex. 13 Columbus Apportionment Board Public Hearing Transcript (Sept. 7, 1991)

Ex. 14 Akron Apportionment Board Public Hearing Transcript (Sept. 12, 1991)

Ex. 15 Apportionment Board Hearing Transcript (Sept. 30, 1991)

Ex. 16 Apportionment Board Hearing Transcript (Oct. 1, 1991)

Ex. 17 Apportionment Board Hearing Transcript (Oct. 3, 1991)

D. 181 Plaintiffs' Motion for Status Conference (April 22, 1992)

D. 192 Technical Amendments to Ohio 1991 Plan of Apportionment (filed May 5, 1992)

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No. 91-1618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,
v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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QUESTIONS PRESENTED

In circumstances where black voters have consistently been able to elect or influence the election of black and white legislators of their choice through coalitional voting with white voters, is the Voting Rights Act violated by an apportionment plan which packs, fragments and segregates black voters for political gain?

Relying upon the federal supremacy of the Voting Rights Act, may a state apportionment board depart from state law and adopt a "policy" of maximizing majority-minority legislative districts statewide where there is no proof of legally significant racial bloc voting or inability of black voters to elect representatives of their choice? May a state apportioning board, in such circumstances, rely upon the federal supremacy of the Voting Rights Act to adopt a "policy" of guaranteeing safe seats for black candidates?

Where Section 5 of the Voting Rights Act is not applicable, does a state apportionment board possess the unreviewable discretion to apply Section 5 remedies on a statewide basis?

Whether the trial court properly found that the Appellants deliberately packed and fragmented black voters for the purpose of destroying coalitional voting of black and white voters in Ohio in violation of the Fifteenth Amendment.

Whether the trial court properly found that the Ohio Apportionment Board departed from the 10% total population deviation in legislative districts in violation of the Fourteenth Amendment of the United States Constitution.

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L. Atwater, *Altered States: Redistricting Law & Politics in the 1990s*, 6 J.L. & Pol. 660, 668 (1990) 20

Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 L. & Pol'y 43, 44 (1988) 45

Bernard Grofman et al., *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 Law & Pol'y 199 (1985) 38

STATEMENT OF THE CASE

On November 1, 1991, Speaker pro tempore Barney Quilter and Auditor Thomas Ferguson, members of Ohio's Apportionment Board, along with minority and white citizens and legislators, filed this action against Governor George Voinovich, Secretary of State Robert Taft and President of the Senate Stanley Aronoff, majority members of the Apportionment Board (Board majority).

Appellees requested a declaratory judgment that Appellants misused the Voting Rights Act by aggregating black voters in single member districts as a remedy for unsubstantiated allegations of existing minority vote dilution. The complaint also sought a declaratory judgment that the apportionment plan adopted by the Board majority violated the Voting Rights Act as well as the Fourteenth and Fifteenth Amendments to the U.S. Constitution. J.A. 1; D. 1, at 22.[1]

On January 31, 1992, the trial court found that the plan violated the Voting Rights Act, remanded the plan to the Board for further action, and took no action on the Fourteenth or Fifteenth Amendment claims. App. A at 14-15a. No appeal was noted from the January 31, 1992 Opinion and Order.

Pursuant to the remand, on February 18, 1992, the Board majority issued "technical amendments" to the 1991 plan. By its Orders of March 10 and March 19, 1992, the trial court found that the amended 1991 plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments. App. C at 119a; App. D at 141-42a, 148a.

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[1] For consistency, the following citation abbreviations are used throughout the brief:

App. Appendix to Jurisdictional Statement
J.A. Joint Appendix
D. Docket Number (see attached Appendix for index)
Ex. Exhibit Number

A. The Voting Strength of Blacks in Ohio Prior to the Adoption of the 1991 Plan

This case involves the decennial redistricting of Ohio and more particularly the redistricting of the black voting populations in Ohio's six major cities—Cleveland, Columbus, Cincinnati, Dayton, Toledo and Akron. Presently, eleven black legislators elected from those cities serve in the Ohio House of Representatives.[2] Each of them is a Democrat elected with large vote pluralities, and each has received the sustained benefit of substantial white crossover voting. J.A. 308.

The previous legislative districts in which these legislators were elected were drawn under the provisions of Article XI of the Ohio Constitution. Though silent on the subject of race, Article XI requires adherence to existing legislative boundaries if those boundaries can reasonably be maintained in light of population changes. App. I at 282a (§ 7(D)). According to the 1990 census, the total population of Ohio is 10,847,115 and its black population is 1,154,826, or 9.39%. D. 131 at 1. Since the eleven minority legislators comprise more than 10% of the total membership of Ohio's ninety-nine member House, minorities have maintained slightly greater than proportional representation in the House merely by historical adherence to the provisions of the Ohio Constitution.

Evidence presented to the trial court established that:

1. Coalitional voting historically has been the rule, not the exception in Ohio and racial bloc voting has not prevented blacks from electing both black and white candidates of their choice. App. D at 132-33a; J.A. 142-43; *see* Charts A & B (Charts A, B & C are included in the attached Appendix).[3]

---

[2] The eleven minority legislators form an integral part of the legislative leadership of the House. One of the named plaintiffs, William Mallory, is black and has served as majority leader of the Ohio House for 18 years.

[3] Tilling admitted that each of Ohio's eleven black legislators are the representatives of choice of the voters from their districts. J.A. 23-24.

2. Blacks have been elected to the Ohio House of Representatives whenever the black population of a district exceeded 35%. App. D at 141a & n.5; J.A. 308.[4]

3. The average proportion of whites voting for Ohio's black legislators exceeded fifty-six percent in the years 1984-1990. App. D at 133a n.3; App. H at 223-24a.

4. Where blacks form more than 10% of the district's population, they regularly have been able to elect or affect the election of black and white legislators with or near 100% voting records on bills of particular minority interest. J.A. 164-65; *see* J.A. 178-81, 332.

5. On forty-nine bills of particular importance to blacks, selected by BEDO, an organization of black elected officials, Democrats on average voted favorably to black interests 95%, as contrasted with only 64% by the Republicans. J.A. 196.

6. Where blacks form 13% or more of a legislative district's population in Ohio, the election results historically have been 100% favorable to Democratic legislators. J.A. 164-65, 178-81; D. 147, Ex. C at 66 (Tilling expresses his agreement).

7. Where blacks form 10% or more of the district's population, election results are 95% favorable to Democrats, and below 10%, the election results are mixed, with Republicans being as likely to be elected as Democrats. *Id.*

8. Of the eleven black legislators currently serving in the House, four were elected from districts exceeding 51% of the black population; four were elected from districts with 42 to 50%; and three were elected from districts with less than 39%. J.A. 308.

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[4] Tilling agreed that "this is a fact" in Ohio. D. 147, Ex. C at 66. In the past twenty years, only one Senate District did not elect a black representative although its population exceeded 35%. App. D at 141a n.5, J.A. 102-03.

B. The Apportionment Process Immediately Preceding Adoption of the 1991 Plan

Appellants Voinovich, Taft and Aronoff delegated substantially all of their authority and discretion to Appellant James Tilling, the Secretary to the Board, adopting the plan he presented without any changes.[5] Tilling personally drew or approved each boundary line for the 1991 plan and its "technical amendments" and from the outset served as the Board majority's spokesman on all matters concerning the boundaries they adopted. J.A. 15-16; D. 102 at 72-73, 95-96. He prepared for the 1990 apportionment process by attending meetings with Republican strategists where the subject of maximizing majority-minority districts for political gain was discussed. J.A. 29-30. Tilling also conferred with the Ohio Republican Chairman, Mr. Bennett, on the beneficial political effects of maximizing majority-minority districts in Ohio. D. 103 at 50, 54-55, 58-60. He lectured at national seminars before Republicans on creating a record and building a case to meet Voting Rights Act legal challenges. J.A. 30-31, 65-66. Benjamin Ginsberg, the general counsel of the Republican National Committee, referred to Tilling as a "wily" campaigner, whose views should be heeded concerning the application of the Voting Rights Act. J.A. 65-66.

Tilling used the fifteen public meetings held throughout the state as a platform to explain the Board's legal

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[5] The only instruction Tilling, a non-lawyer, received from the Board majority who are all lawyers, was to follow the Voting Rights Act and the United States and Ohio Constitutions. D. 103 at 57. Aronoff gave Tilling no specific directions, did not speak to him about the lines Tilling ultimately drew and was not aware of whether a racial bloc voting analysis was done. J.A. 80-81. Taft said that Tilling did not report to anyone on the Board, that there was no method for monitoring his progress, that Tilling made his own analysis and that Tilling was an authority on reapportionment. J.A. 82-84. Voinovich saw the plan for the first time at the Apportionment Board meeting when it was adopted. Tilling told him it was within the framework of the Constitution and he relied on Tilling. J.A. 232-34.

obligations under the Voting Rights Act. Representative statements which he made include: "The courts have said wherever you can create a majority-minority district, you must do so, it's just that simple." J.A. 279; Appellants' Brief at 6 n.6. *Accord*: J.A. 279-83; D. 154 (transcripts of public meetings). "There is absolutely no doubt in the mind of anyone who has followed this process through the courts that we are under a mandate that wherever a majority-minority district can be created, that must be done. It is beyond the realm of discussion." J.A. 279. On the totalities of circumstances issue he said that, "[w]e need to establish for the record the totality of the circumstances in each urban area in order for us to do our job correctly . . . ." J.A. 284.

Tilling did no specific studies of the six urban communities where the majority of Ohio's black population is located. J.A. 28. The district court found that the transcripts of these public meetings shows a "paucity of information on these [Voting Rights Act] factors in the record. Of the information available, much was anecdotal and seems to be culled from Tilling's personal experience rather than from community sources." App. A at 13a. Tilling exhibited no awareness of the differing obligations of jurisdictions covered by Section 5 of the Voting Rights Act versus those not covered, nor the differing obligations where Voting Rights Act violations under Section 2 are proven and where they are non-existent.

The database Tilling used permitted him to calculate black populations and black voting age percentages by district, ward and precinct. In each urban area, Tilling's first step, as evidenced by his handwritten notes, was to use this data to draw districts by aggregating black populations on his computer and drawing lines around those populations. J.A. 15-16, 58-64. This database, which was stipulated into evidence, also provided a political index showing the results of the 1990 Ohio elections by district, ward and precinct in races for governor, secretary of state and auditor. J.A. 20; D. 131 at 2; *see* J.A. 41-43. In addition, public records of the results of all

Ohio elections were available to Tilling as were the roll call votes of individual legislators on bills involving issues of specific concern to the minority community. J.A. 9, 25.

Neither Tilling nor his staff performed any regression analysis to determine if racially polarized voting existed in any of the minority districts he redesigned. J.A. 12; App. A at 12a. Although he stated that he examined the racial voting patterns for minority legislators, he did not reduce his calculations or conclusions to writing. J.A. 10-11; App. A at 12a. In response to the question of whether this data disclosed legally significant racial bloc voting he could not give an unequivocal answer but stated that "what we did find was that given the opportunity there is a much higher percentage of black vote for black candidates than white vote for black candidates." J.A. 12. Tilling concluded and testified that racial bloc voting existed but also testified that he was aware that blacks had been consistently elected from districts with as low as 35% black population. J.A. 11-12, 24; App. A at 12-13a.

Tilling did not examine the voting record of any elected representatives to determine his or her responsiveness to the particularized needs of the minority community. J.A. 24-25; App. A at 13a. He stated that he reviewed voting records prepared for previous Senate campaigns and that this was "part of my mental equipment as I began this process." D. 102 at 180-81; App. A at 13-14a.

While Tilling was in the process of drawing the 1991 plan he received "Republican Opportunities," a document setting forth a strategy as to how the Republicans could gain control of Ohio's House of Representatives, the principal political objective of the Ohio Republican Chairman. J.A. 32-35.[6] The strategy recommended by "Republican Opportunities" was to "[p]ack as many Demos [Democrats] as possible into . . . Black-majority inner-city HDS

[6] "Republican Opportunities" was written by David Horn, Director of the Center for Research into Governmental Processes, Inc., an Ohio non-profit organization.

[House Districts]" and divide the remaining Democrats evenly in Republican-dominated districts. J.A. 39; see J.A. 100. Republican Representative Lawrence delivered this document to Tilling and he told her that he found it interesting but that there were problems in creating Senate districts the way the document described. J.A. 32-36; D. 111 at 48-51. Tilling's testimony that he lacked the time to present the document to the Board majority is irrelevant since they delegated the decision making and line drawing to him. Tilling requested a copy precisely to see what a Republican gerrymander would look like. J.A. 33-34.

"Republican Opportunities" was based upon an earlier 1990 document that also came from Tilling's files entitled "Let's Pretend," which he also admitted reading. D. 104 at 18-19. "Let's Pretend" shows how the districts would actually be configured and what the packed minority population figures would be in each district. J.A. 47. Again, the same strategy was recommended—" 'pack' as much of the Democrat minority [blacks] as possible into . . . heavily Democratic districts with Black majorities [and] fragment the remaining Democrats into . . . Republican-dominated districts . . . ." J.A. 49-52. The black population percentages in "Let's Pretend" correlate to or are somewhat lower than the percentages ultimately adopted by the Appellants in the 1991 plan. *Compare* J.A. 47 *with* J.A. 305-08.

Prior to drawing final boundaries, Tilling, on behalf of the Ohio Senate majority, entered into a contract with Floyd Johnson, a member of the Ohio NAACP. J.A. 17. In exchange for $10,000.00 Johnson agreed to "[m]inipulate [sic] lines for new Ohio State Representative districts in those counties where their [sic] is significant minority voting population." J.A. 77-78. Johnson drew legislative boundaries by surrounding the significant minority voting population in each of the urban areas. He testified that he maximized majority-minority districts solely for the purpose of ensuring the election of black

representatives in Ohio. J.A. 71. However, he did no regression analysis, testifying that he did not know what it is, nor did he examine the voting records of any legislators before drawing his minority districts. J.A. 70-71, 73, 75-76. Tilling did not inform Johnson about the configuration of the districts Tilling drew surrounding Johnson's districts, nor was it of any significance to Johnson. J.A. 71.

In drawing these districts, Johnson was acting on his own and *not* on behalf of the NAACP. J.A. 67.[7] Individuals associated with the Ohio Republican Party assisted, urged and directed Johnson to increase the black population in the districts he drew. J.A. 67-70, 73-74. Tilling testified that he accepted Johnson's districts in each of the urban areas and incorporated them into the 1991 plan adopted by the Board majority.

C. The Effects of the 1991 Apportionment Plan and Its "Technical Amendments"

1. *The 1991 Plan*

Of the ninety-nine House Districts in Ohio, forty-four of the 1981 districts were unaffected by population changes to the extent that they were within the permissible population range mandated by the Ohio Constitution and had the potential to be retained. App. I at 280-81a (§§ 3-4); J.A. 187-88.[8] Appellants ignored the directive

[7] Moreover, Tilling knew that Johnson was acting on his own accord and *not* in conjunction with the NAACP. Tilling understood from the NAACP that as long as Johnson did not represent that he was working on behalf of the NAACP or that the work performed by Johnson was the NAACP's, there would not be a conflict of interest. J.A. 18. Johnson, on behalf of the state NAACP endorsed Tilling's plan at the February 18, 1991 hearing, but stated that he was not speaking on behalf of the national NAACP. D. 147, Ex. C at 72, 75.

[8] Thirty-one of these districts were maintained in Appellees' "7D plan" submitted to the Board on February 18, 1992. D. 147, Ex. C at 32-37.

of Article XI of the Ohio Constitution that "[i]n making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 [relating to population] of this Article." App. I at 282a (¶ 7(D)). The 1991 plan preserved only seven of the pre-existing districts. J.A. 295. All of the districts represented by minority legislators were reconfigured by the 1991 plan even though four of those districts had the necessary population to be preserved. J.A. 296, 308.

As a result of maximizing the number of majority-minority districts wherever possible: (1) nine majority-minority districts were created where previously there had been four; (2) where formerly there had been twenty-three districts with black population between 10 and 50% the 1991 plan created eleven; and (3) where there had been twenty-two districts of less than 10% black population the 1991 plan created thirty-one. J.A. 198-99. In nine districts, Appellees asserted a Voting Rights Act violation alleging that the 1991 plan packed and fragmented minorities, thus either wasting or nullifying their voting strength. *See* Charts A & B. Black populations were aggregated into districts where minorities were electing candidates of choice with substantial white crossover vote and fragmented into districts with less than 10% population. *Id.*

The total black population in each of the nine districts was split into separate segments and each segment was placed into separate districts in the 1991 plan. *Id.* For example, looking at Chart A, 1981 House District 29 was split into five segments with its black population dispersed into 1991 Districts 21, 22, 25, 26 and 27 in the 1991 plan. Thus, that segment of the black population dispersed into 1991 District 27 is now part of a district with 3.5% black population; previously these voters were in a district containing 38.5% black population and were able to elect a candidate of their choice. Similarly, the districts with more than 10% black population which

elected white representatives who were 90 to 100% responsive to issues of particular concern to the minority community also were packed into heavy black districts or fragmented into districts with less than 10% black population. *See* Chart B.

The following is a summary of Tilling's answers on *direct* examination, stating why he changed the legislative boundaries of specific black legislators.

a. *Representatives Miller and Beatty (Franklin County—Columbus)*

Tilling admitted that Representative Miller's district did not need to be reconfigured to meet population changes pursuant to the Ohio Constitution. D. 123 at 87. Nevertheless, his district was changed to increase black population from 38.5% to 48%. *See* Chart C. Representative Beatty's district was increased from 46.8% to 55.9%. *Id.* Tilling admitted that in deciding the question of whether there was minority vote dilution that justified the application of the Voting Rights Act in Franklin County he made "a judgment call." D. 123 at 102. Although he acknowledged that black voters have had the opportunity in Franklin County to elect the candidate of their choice, he was concerned that either Representative Miller or Representative Beatty might desire to run for a different office. Since either Miller or Beatty or both of them might not continue to serve, Tilling reconfigured both districts relying for his authority on his interpretation of the Voting Rights Act. *Id.* at 102-03. "Obviously we tried to configure both of them to comport with our understanding of both population movements within the county and the Voting Rights Act and tried to make sure that both districts had a substantial component of minority population." *Id.* at 87.

b. *Representatives Mallory and Rankin (Hamilton County—Cincinnati)*

Tilling decided that the black population of Representative Mallory's district should be increased from 45.9% to

59.8% since Mallory was "in his 60's" and Tilling "look[ed] ahead to the time when perhaps Representative Mallory would not be there and running for reelection." *Id.* at 107; *see* Chart C. He relied upon the Voting Rights Act for his authority to make this increase in order to avoid "minority vote dilution." D. 123 at 105. Representative Mallory objected to the increase in the black population in his district. *See* D. 147, Ex. B at 87.

Tilling's reliance upon the Voting Rights Act to increase Representative Rankin's district from 53.2% to 61.1% was based on the fact that this figure was recommended to him by Floyd Johnson. D. 123 at 106.[9]

c. *Representative Jones (Lucas County—Toledo)*

Representative Jones' district did not need to be redrawn under the Ohio Constitution because of population requirements. J.A. 206; App. H at 174a. Nevertheless Tilling redrew that district, increasing black population from 41.7% to 50.6% (*see* Chart C), relying upon the authority of the Voting Rights Act. "Casey is a black Democrat from Lucas County, [his district] met the requirements populationwise [of the Ohio Constitution] but again did not contain as much of the minority community as we believed could feasibly be included." D. 123 at 89. Yet, Tilling admitted that Representative Jones would have no difficulty getting elected as long as he continued to run. *Id.* at 90.

d. *Representative Sykes (Summit County—Arkron)*

None of the districts in Summit County, including that of Representative Sykes, needed to be changed because of the Ohio constitutional population requirements. J.A. 206;

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[9] Tilling testified that this figure was used in Johnson's plan and recommended to him "by the NAACP." As noted previously Floyd Johnson was not acting on behalf of the NAACP. *See supra* note 7. Although Tilling's urban districts were approved by the Ohio Conference of Branches, neither the 1991 nor the amended 1991 plan were approved by the national office of the NAACP. D. 147, Ex. B at 73-75.

App. H at 174a. Tilling stated that Summit County was "one of the more difficult decisions that we had." D. 123 at 88. He reconfigured Representative Sykes' district to increase black population from 35.4% to 43.3% under the authority of the Voting Rights Act based on his unsupported assumption that "sometime before the middle of the decade it would have been a district that would have been below 30 percent black voting age population" and in order to prevent this "we felt we had to reconfigure it." *Id.* at 89; *see* Chart C.

e. *Representatives McLin and Roberts (Montgomery County—Dayton)*

Athough Tilling admitted that he found no evidence of minority vote dilution in Montgomery County, he reconfigured both Representatives McLin and Roberts' districts acting under the authority of the Voting Rights Act. D. 123 at 108-09. He increased the black population percentage in Representative McLin's district from 42.1% to 54.8% because of what he termed population flow "down the road." *Id.* at 108. "So I think in Montgomery County what we were faced with was not an example of vote dilution but an attempt to try to look down the road and anticipate where population changes might be occurring that could disrupt the existing districts." *Id.*

Tilling reconfigured Representative Roberts' district even though it met the population requirements of the Ohio Constitution. J.A. 206; App. H at 174a. In this instance, however, Roberts' black population was reduced from 36.1% to 32.2% because in Tilling's view "he [Roberts] has shown the ability to get white cross-over voting already." D. 123 at 110. Tilling decreased the black population pursuant to his view of the Voting Rights Act, stating that this decrease "would prevent any vote dilution." *Id.* at 88. Tilling did not explain how the reduction in Roberts' black population percentage was justified in light of the increases in black population percentages of Representatives Mallory, Rankin, Beatty and

Sykes, whose white crossover voting was higher than that of Roberts.[10]

2. *The "Technical Amendments" to the 1991 Plan*

In their initial trial brief (Nov. 29, 1991) Appellants admitted that they deliberately maximized the number of majority-minority districts in the 1991 plan because they believed this was required by federal law. Appellants stated that: (1) they "corrected the minority voter dilution inherent in the Democrats' 1981 apportionment" (D. 36 at 6); (2) they could not "retain the discriminatory [1981] districts" (*id.* at 13); (3) they could not "with impunity, simply ignore minority voting dilution existing in a prior apportionment but must *affirmatively* act to rectify such discrimination *whenever* the opportunity exists" (*id.* at 29); and (4) "[i]ndeed, deliberate construction of minority controlled voting districts is *exactly* what the Voting Rights Act requires." *Id.* Following hearings and oral argument before the trial court on December 3 and December 17, 1991, Appellants reiterated these same points in their post trial brief. D. 137 at 32, 89, 90, 91, 115.

On January 31, 1992, the trial court held that the 1991 plan violated the Voting Rights Act because maximization of the number of majority-minority districts was premised on an incorrect application of federal law. App. A at 7-8a, 14a. The court further held that the totalities data reflected a casual analysis (*id.* at 13a) that was inadequate to support the remedy created in the 1991 plan. *Id.* at 14a. Stating that Voting Rights Act violations cannot be assumed, the court remanded to the Board to give it the opportunity to provide "evidence"

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[10] With respect to the minority representatives in Cuyahoga County, Tilling testified that he found evidence of minority vote dilution because they had populations which were above the threshold permissible by the Voting Rights Act. D. 123 at 93. He made no attempt to explain what the black population percentages were in 1981 and whether they had increased since that time as a result of population migration.

that would legally support the remedy the Board majority created. *Id.* at 11a, 14a. In the alternative, the court provided the Board the opportunity to submit a revised plan; either of these options were to be accomplished by February 19, 1992. *Id.* at 15a.

The Board majority reconvened the Board on February 11 and 18, 1992 to reconsider the 1991 plan. However, at the outset of the February 11 meeting the Board majority's counsel stated that despite the trial court's decision it was their legal opinion that the plan fully complied with the Voting Rights Act's requirement to maximize majority-minority districts.[11]

The Board majority, by a 3-2 vote, adopted Findings and Conclusions consisting of 118 pages prepared by Appellants' counsel. These Findings were not distributed and moved for adoption until shortly before the Board concluded its day long session at 5:00 p.m. on February 18, 1992. D. 147, Ex. C at 76-77. These findings are substantially similar to the Findings and Conclusions Appellants previously submitted to the trial court. App. C at 119a; *compare* D. 133 *with* App. H at 160a.

On February 18, 1992, the Board, after remand, also adopted "technical corrections" to the 1991 plan, which they claimed resulted primarily from combining split political boundaries. D. 147, Ex. C at 84-86. With the exception of the increase in black population in Representative Roberts' district, the black population in each of the urban districts was decreased. *See* Chart C. These changes again were made under the authority of the Voting Rights Act. For example, Tilling noted that in Franklin County, 1981 District 31, Representative Beatty received 50.3% white crossover voting while Representa-

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[11] D. 147, Ex. B at 13. "We believe that it is firmly established by a growing volume of legal precedent that a single member district plan which does not create, where reasonably feasible, districts in which a minority group constitutes a majority violates Section 2 of The Voting Rights Act because it impermissibly dilutes or fractures the Voting strength of the minority." *Id.* at 11-12 (Victor Goodman).

tive Miller received "only" 44.5%. *See* Chart C. Tilling then stated "[a]nd *in my view* certainly, and I would ask the Board to consider this, *I believe* that is a very significant finding of racially polarized black voting." J.A. 288 (quoting D. 147, Ex. C at 60) (emphasis added). The trial court concluded that the additional "meager information" submitted by the Board and the technical amendments were inadequate to salvage the 1991 plan from violating the Voting Rights Act. App. C at 119a.

SUMMARY OF ARGUMENT

1. The record demonstrated that there was no legally significant racial bloc voting for legislative races in Ohio, that black voters had been able to elect black and white representatives of choice over a sustained period of time, and that under the 1981 boundaries drawn pursuant to Article XI of the Ohio Constitution black voters had achieved greater than proportional representation in the state legislature. Nevertheless, Appellants reconfigured districts historically electing blacks with as little as 35% black population to "maximize" minority districts, both as a "right" and a "remedy." The device they chose to "maximize" was to pack black voters into majority-minority districts where their votes would be wasted and to fragment them into districts where their votes would be rendered ineffective. Appellants adopted this device allegedly to correct "inherent discrimination" in the pre-existing districts. The trial court properly held, however, that the record Appellants proffered to justify the "inherent discrimination" conclusion was "grossly inadequate."

2. Appellees charged that Appellants misused the Voting Rights Act on a statewide basis as a device to dilute minority voting strength and that Appellants racially gerrymandered nine specific districts where blacks previously had been electing representatives of choice in violation of Section 2 of the Act. The trial court properly found that Appellants' plans packed and fragmented black voters, that there was effective coalitional voting between

blacks and whites in Ohio, and that Appellants' plans targeted the destruction of this coalitional voting.

3. Appellants insisted upon applying a Section 5 remedy to Ohio, a non-Section 5 state, but denied any obligation to show a factual basis for their legal conclusion that majority-minority districts must be maximized or that black candidates (incumbents and non-incumbents) must be guaranteed safe black seats.

4. Appellants have retreated from their legal positions before the trial court. They erroneously claim that the court "mischaracterized" their per se arguments and shifted the burden of proof to them to examine the totalities of circumstances criteria under the Act. In fact, the court did not mischaracterize their arguments or shift the burden of proof; Appellants themselves introduced the per se approach and defended their actions on the basis of the "totalities" criteria, but failed to persuade the court of the merits of that defense.

5. By entering into a stipulation to dismiss the January 31, 1992 Opinion and Order of the trial court, Appellants have abandoned any appeal of the decisions or requirements of that order, including their argument that the trial court shifted the burden of proof to them.

6. Appellants' argument that the trial court should defer to their application of "state policy" suggests that they have some reservoir of "policy" that they are free to adopt aside from the Ohio Constitution. In fact, all of Ohio's state "policy" on apportionment is set forth in the Ohio Constitution. From the outset, Appellants' consistent purpose has been to avoid the anti-gerrymandering provisions of the Ohio Constitution by insisting that the Voting Rights Act overrides these provisions.

7. In the trial court's orders of March 10, 1992, and March 19, 1992, the trial court made ample findings to support its conclusion that the plan violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments.

ARGUMENT

I. APPELLANTS SOUGHT TO "REMEDY" UNPROVEN VIOLATIONS BY IMPERMISSIBLY PACKING AND FRAGMENTING MINORITY VOTERS

A. The Court Did Not "Mischaracterize" the Appellants' Position

From the outset of the apportionment process Appellants missed no opportunity to pack black voters and dilute their voting strength. Their device for doing this was the adoption of a policy to maximize majority-minority districts. While their stated justification for these packed districts has varied with Appellants' fortunes in the court, the purposeful intent has remained steadfast. At the public hearings held throughout the state, Tilling, as agent and spokesman for the Board majority, proclaimed that majority-minority districts were required as a matter of law. Tilling's legal justifications before the public were mirrored by Appellants' counsel's repeated legal arguments urging the trial court to conclude that "deliberate construction of minority controlled voting districts is *exactly* what the Voting Rights Act requires." D. 36 at 29.

Reacting to the attack of the Appellees and the finding of the court below, Appellants are now in full retreat from their previous arguments. In their Brief to this Court they argue that the trial court manufactured a legal position that it attributed to them. They contend that the trial court's reference to their "actions as deliberately creating minority controlled districts 'wherever possible' . . . [was] a mischaracterization of the process" that they followed. Appellants' Brief at 24. The excerpts from Tilling's public statements, his deposition and the arguments of Appellants' lawyers in their trial briefs, during trial and to the Board on remand, demonstrate that there was no "mischaracterization" by the trial court of Appellants' legal position. Their legal position was consistent and unambiguous: majority-minority districts

had to be created wherever possible.[12] As the trial court accurately stated, it "addressed an Apportionment Board that applied a rule mandating the creation of majority-minority districts whereever possible." App. D at 131a.

B. No Per Se Approach Is Mandated Under Federal Law

The trial court rejected the argument that majority-minority districts were required under cases interpreting the Voting Rights Act or the Act itself. App. A at 8a. The court noted that Appellants did not cite and could not cite a single case standing for the proposition that Section 2 requires the per se maximization of majority-minority districts, in the absence of a proven violation. App. D at 140a.

The consistent theme of the Senate Report, of this Court's decision in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and other case law interpreting Section 2, is that the question of whether a violation exists is not resolved by resort to per se remedies but is intensely fact-driven. "[T]he question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'" S. Rep. No. 417, 97th Cong., 2d Sess. 30, *reprinted in* 1982 U.S.C.C.A.N. 177, 208 (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)). As this Court concluded in *Gingles*, "this list of typical factors is neither comprehensive nor exclusive" and " 'there is no requirement that any particular number of factors be proved, or that a major-

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[12] Appellants argued to the trial court that they must "maximize" minority voting strength pursuant to the Voting Rights Act:

> "Where opportunities exist, the State must *maximize* minority voting strength. Thus, it may be a violation of Section 2 for a state to fail to create a district in which minorities are the majority if such a district can be created. Even if not a 'right,' maximization of minority voting strength may clearly be a remedy."

D. 36 at 32 (citation omitted); *see supra* note 13; D. 48 at 58-59; D. 137 at 89-90.

ity of them point one way or the other.'" 478 U.S. at 45 (quoting S. Rep. at 29, 1982 U.S.C.C.A.N. at 207).

Appellants had a predetermined remedy searching for an elusive and unprovable violation. Because there was no violation to be found, Appellants repeatedly have insisted upon applying a per se remedy to Ohio as if it were a Section 5 state. However, no areas of Ohio have ever been subject to the purview of Section 5. For Section 5 jurisdictions, Congress has already made a "careful review of the contemporaneous record of on-going voting rights discrimination" in the areas affected. S. Rep. at 9, 1982 U.S.C.C.A.N. at 186. Accordingly, a Section 5 state may either set out to maximize majority-minority districts or be judicially required to do so without making the "searching practical evaluation" this Court most recently found in *Gingles* under Section 2 of the Act.[13] "The Voting Rights Act authorizes and in some instances compels racial gerrymandering in favor of blacks and other minorities." *Prosser v. Elections Bd.*, No. 92-C-0078-C, 1992 U.S. Dist. LEXIS 8103 at *28 (W.D. Wis. June 2, 1992) (per curiam). Indeed, the Act authorizes and may compel the creation of majority-minority districts where Section 5 is at issue or if it is necessary to remedy proven violations of Section 2.

Even though Section 2 employs a "results" test, the burden is upon those asserting a violation of the Voting Rights Act to provide evidence, establish the violation and justify imposition of a remedy. If a Section 2 violation is established, an appropriate remedy *may* include maximizing the number of majority-minority districts, but

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[13] In *United Jewish Organizations v. Carey*, 430 U.S. 144, 159 (1977), which was mis-cited by Appellants to support their position (Appellants' Brief at 27), the redistricted area of New York at issue was subject to Section 5 and the creation of majority-minority districts was a Section 5 remedy implemented in order to avoid retrogression of the minorities' right to vote. Appellants also mis-cite *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 681 (1991) (Appellants' Brief at 27), which the trial court has already distinguished on well-reasoned grounds. App. D at 138a.

neither the language of the Voting Rights Act nor the decisions of this Court require such a remedy in all circumstances. The Senate Report stated that the nature of the Section 2 remedy will depend upon a factual determination of the totality of circumstances.

> "The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances."

S. Rep. at 31, 1982 U.S.C.C.A.N. at 208.

Given the remarkable similarity in language and approach, the genesis of Appellants' confusing misuse of the Voting Rights Act, *i.e.* the per se maximization of majority-minority districts in Ohio, appears to be an article written by Lee Atwater, former Republican Party Chairman, which states:

> "First, the [*Gingles*] Court implies that, under the Voting Rights Act where minority districts *can* be created they *must* be created . . . . This state of the law under Section 2 and Section 5 has two significant nationwide implications for the 1990s redistricting cycle. First, where minority districts currently exist, they must be maintained (though not necessarily in the same configurations). Second, where minority districts can be created, they must be created."

L. Atwater, *Altered States: Redistricting Law & Politics in the 1990s*, 6 J.L. & Pol. 660, 668 (1990).

However, both *Gingles* and the Senate Report make it clear that the Atwater approach of treating Section 2 and Section 5 interchangeably is not the process contemplated under the Act. In *Gingles*, Justice O'Connor made it clear that there is no magic in a 50% majority figure:

> "[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions and regardless of the

> extent of past discrimination against minority voters in a particular State or political subdivision."

478 U.S. at 94-95 (O'Connor, J., concurring). The only language contained in the Act addressing the degree of representation states, "[n]othing in this section establishes a right to have members of the protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). As the Senate Report states, this provision "put[s] to rest any concerns that have been voiced about racial quotas." S. Rep. at 31, 1982 U.S.C.C.A.N. at 208. Given Congress' express statement that the Act does not require proportional representation, it follows that Congress did not intend to require maximizing majority-minority districts as either a "right" or a "remedy," absent proof of vote dilution.

II. APPELLANTS SEEK UNFETTERED DISCRETION IN LIEU OF A SEARCHING PRACTICAL EVALUATION WHEN DETERMINING THE EXISTENCE OF PURPORTED VOTE DILUTION

The "mischaracterization" and "shifting burden of proof" arguments now advanced by Appellants are an attempt to distance themselves from the unambiguous posture they previously took in the trial court. This retreat is an understandable exercise in hindsight, since by initially invoking alleged violations of the Act as the excuse for their per se "remedy" Appellants cannot logically avoid an obligation to present totalities evidence nor avoid the trial court's finding that their submission was "grossly inadequate." App. A at 11a. Moreover, if there is no Section 2 violation shown by those who argue its existence, then maximization of majority-minority districts is neither required, nor necessarily permissible in Ohio.

Following remand on January 31, 1992, Appellants, in apparent recognition that their totalities analysis initially submitted to the court was seriously deficient, for the first time argued that they should be exempt from the necessity of submitting any totalities analysis and that

the trial court had shifted the burden of proof. They made this argument in spite of the fact that twice they submitted to the trial court documents labelled as "totalities of the circumstances" evidence which they argued conclusively proved vote dilution. To further distance themselves from the factual vacuum of their record, Appellants also argue that the court should have deferred to their "policies and preferences." Appellants' Brief at 23. The three arguments Appellants advance here, the "exemption" from a "totalities" analysis argument, the "shifting burden of proof" argument, and the "state policy" argument all amount to the same thing: Appellants seek the unreviewable discretion to apply Voting Rights Act provisions, intended to shield minorities from unlawful discrimination, as a sword against the voting strength of blacks, their political opponents, with no obligation to provide either credible factual or legal support for their decisions or behavior.

A. Appellants Waived the "Burden" Issue

Appellants' primary argument is that the trial court shifted the burden of proof by requiring them to show a past violation of Section 2 of the Voting Rights Act. Appellants' Brief at 22. The shifting burden of proof argument derives from the trial court's January 31, 1992 Opinion and Order where the court stated that "[u]nless it [the Board] can show justification under the totality of the circumstances test for the present configuration the Board must submit a revised plan to this court within 20 days of this order." App. A at 14-15a.

Instead of appealing the January 31 Order, Appellants undertook to develop a "totalities" justification for the present configuration, in form only. Thus, they reconvened the Board on February 11 and February 18, 1992, received substantially the same evidence that had been presented to the court, and resubmitted their plan to the court with "technical corrections" on February 19, 1992. After the time to appeal the January 31 order expired, Appellants included that order among the orders on appeal to this Court in their March 11, 1992, notice of appeal. App. E at 149a.

Appellees moved to dismiss the Appellants' appeal of the January 31, 1992 Order as untimely filed. In response to that motion, Appellants entered into a stipulation that states, "[p]ursuant to Supreme Court Rule 18.5 Plaintiffs and Defendants hereby stipulate that the portion of the appeal to the United States Supreme Court from the January 31, 1992 Order of the District Court shall be dismissed. The stipulation does not affect the appeal from [the] March 10, 1992 Order." App. F at 153a. Consequently, Appellants abandoned any appeal of the decisions reached by the trial court in the January 31 Opinion and Order.

The March 10, 1992 Order did not purport to shift any burden to Appellants, thus their argument concerning the shifting of burden must be based upon the January 31 Order. However, even assuming *arguendo*, that the trial court placed such a burden on Appellants, that issue is not properly before this Court as a result of Appellants' voluntary stipulation. Where Appellants have failed to properly seek review, this Court has consistently refused to address issues improperly before it. *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 421 n.12 (1972).[11] Accordingly, this Court should not reach the question presented by Appellants regarding the alleged shifting of the burden of proof.

B. Having Voluntarily Placed the "Totality of Circumstances" in Issue Appellants Are Now Estopped from Challenging the Trial Court's Use of This Standard

Contrary to the Appellants' assertion the trial court neither relieved Appellees of their burden of proving their declaratory judgment case nor the burden of proving minority vote dilution in the nine districts where specific violations of the Voting Rights Act were alleged. Long

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[11] *Accord: Dellmuth v. Muth*, 491 U.S. 223, 232 n.3 (1989); *Alexander v. United States Dept. of Housing & Urban Dev.*, 441 U.S. 39, 45 n.5 (1979); *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 16 n.8 (1979); *United States v. Stapf*, 375 U.S. 118, 122 n.7 (1963).

before this case was filed Appellants voluntarily and publicly shouldered the burden of justifying the majority-minority districts which they sought to maximize under a totalities of circumstances analysis. *See supra* pp. 5, 13.

Appellants' counsel, not the trial court, placed the Appellants' "totalities" analysis in issue. Before any ruling by the trial court, Appellants in their pretrial and post-trial briefs proffered evidence relating to the seven "totalities" criteria set forth in the Senate Report to show that their majority-minority districts were justified under the Act. D. 36 at 33-36; D. 137 at 37-52. In their pretrial brief Appellants summarized their argument as follows: "In short, the 'totality of circumstances' strongly support rectifying the inherent discrimination in the 1981 apportionment. Defendants have done so." D. 36 at 36. Contrary to Appellants' arguments concerning an alleged shifting of burden, the court simply recognized the obvious flaw in Appellants' defensive posture: by not following the "process" of examining relevants facts, Appellants left themselves open to the resulting "pitfalls" that arose as a result, including a valid fact-based finding of vote dilution. App. A at 16a.

The trial court also specifically denied that it forbade Appellants either from anticipating a Voting Rights Act challenge or attempting to remedy potential violations *before* analyzing the totality of the circumstances. Rather, the court accurately stated that it responded to Appellants' assertion that federal law required them to aggregate black population in districts to remedy the vote dilution evidenced in their totalities analysis. App. A at 11a, 14a. By insisting at trial that they had conducted a full "totalities" examination of the relevant evidence, Appellants forced the trial court to address the issue and rule on the sufficiency of their totalities analysis.

C. The Trial Court Was Justified Fully in Finding Appellants' "Totalities" Analysis "Grossly Inadequate"

In support of its finding that the Appellants' totalities analysis was "grossly inadequate," the court noted that

Tilling arrived at his conclusion that there was significant racial bloc voting without the benefit of any objective and credible evidence, including regression analysis. App. A at 12a. The court concluded that Tilling's analysis did not "rise to the level of proof of racially polarized voting" or of the other totalities factors because, among other things: (1) he failed to subject the data to any statistical analysis; (2) he relied upon his unwritten casual analysis of voting returns as evidence of racial bloc voting; (3) he was unable to give an unequivocal response to the issue of whether racial bloc voting was legally significant in the districts at issue; (4) he failed to analyze the voting records of representatives; and (5) much of the public hearing information was anecdotal and culled from Tilling's personal experience. App. A at 12-13a. The Court thus concluded that the Board's "totalities" assessment fell "far short of the 'searching practical evalution of past and present reality' mandated by the legislative history," as required by this Court's decision in *Gingles*. App. A at 14a; *see supra*, pp. 4-6.

The Board's second "totalities" submission after remand contained only "meager information that was not previously before this Court." App. C at 119a. The well-established legal principle that remedies must be commensurate with the violation [15] leads to questions about what "new" totalities evidence the Appellants found after remand to justify their quota or proportional representation remedy. The trial court found that the Board's "new" socioeconomic evidence, merely consisting of seven exhibits 101-107 not previously submitted, "fail[ed] to connect the socioeconomic statistics presented to any proven inability of black voters either to elect or affect the election of candidates of their choice . . . . No such proof was even proffered by the Board." App. D at 134a.

The trial court also found that the totality of circumstances showed coalitional voting between whites and

[15] *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) ("The remedial powers of an equity court must be adequate to the task, but they are not unlimited.").

blacks, that the Voting Rights Act was not designed to prevent coalitional voting and that accordingly a central issue in the case was "whether the Board should be permitted to destroy what is right in Ohio— . . . coalitional voting." *Id.* at 132-34a. Appellants' only comment below about coalitional voting was their straightforward complaint that it operated to elect their political enemies.[16]

The core of the court's concerns about the Board's totalities analysis was the Board's decision to ignore three critical facts: (1) "the absence of racial bloc voting;" (2) the ability of black voters "to elect both black and white candidates of their choice;" and (3) the election of candidates of choice "over a sustained period of time." App. D at 130a. Appellants never proffered any evidence to support even an inference that these circumstances had changed or were likely to change in the future. Instead, they asked the trial court to ignore the history of the ballot box in Ohio showing the compelling fact that minority candidates of choice repeatedly had been elected from districts with black populations with as little as 35%. J.A. 308. This single fact belies their argument that they were entitled to override the Ohio Constitution and thus misapply the Voting Rights Act. They judicially admitted this fact in their Answer to Appellees' complaint:

> "Defendants admit the allegations contained in Paragraph 33 of Plaintiffs' Complaint that in Ohio under the Democrats' 1981 apportionment, African-American legislators have been elected in areas with minority populations as low as thirty-five percent (35%), that the Ohio House of Representatives had eleven (11) minority members, that only four (4) of those minority members are elected from a minority-majority district and that there is a large white crossover

[16] Tilling remarked at the February 18, 1992 Board hearing that he has "rarely seen a well-heeled Republican House candidate running in a minority district," recognizing that in every district where blacks form at least 13% of the population Democrats are elected. D. 147, Ex. C at 64-66.

> vote in many parts of Ohio to elect minorities to state legislative office."

J.A. 2, D. 15, ¶ 11 at 5-6. Appellants have continued to ignore the legal implications of their admissions. The specific language of the Voting Rights Act singles out the election of minorities for special emphasis, stating that "[t]he extent to which members of a protected class have been elected to office in the State . . . is one circumstance which may be considered . . . ." in determining whether members of the protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).[17]

Appellants also ignore the court's findings that based on the record the plan abridges the right to vote of black voters by packing and fragmenting. Appellant's answer, along with the previously cited excerpts from Appellants' trial briefs provided an ample record upon which the court could have rendered judgment in favor of Appellees on their declaratory judgment claim regarding misuse of the Voting Rights Act. In their complaint, Appellees asked the court to enter a declaratory judgment that: (1) the Voting Rights Act did not prescribe maximizing majority-minority districts in the absence of the type-sensitive totalities evaluation articulated in the legislation and by *Gingles*; (2) the Appellants improperly used the Voting Rights Act to ignore Ohio consitutional requirements; and (3) Appellants impermissibly diluted minority voting strength by packing, fragmenting and segregating minority voters in nine districts. J.A. 2, D. 1 at 22. The trial court made each of those findings. App. A at 7-8a, 14a, 16a; App. D at 130a, 132-34a, 141-44a, 146a.

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[17] In *Gingles*, this Court reversed the trial court because it had ignored the continuous success of black voters in one of North Carolina's multimember districts. 478 U.S. at 77. That success resulted in proportional representation inconsistent with the plaintiff's allegation that the ability of black voters in that district was unequal to that of white voters in electing representatives of their choice.

D. Rather Than Follow State Policy Appellants Avoided It

The entirety of Ohio's "policy" regarding apportionment is set forth in Article XI of the Ohio Constitution, which is silent on issues of race but is clearly designed to avoid partisan gerrymandering.[18] The Board's discretion in drawing districts under the Ohio Constitution is deliberately limited. Consequently, Appellants were driven to rely exclusively on the Voting Rights Act in order to justify their determination to effect partisan gerrymandering by purportedly maximizing majority-minority districts. Appellants are not entitled to use the Voting Rights Act to override the Ohio Constitution in order to achieve a predetermined purpose of diluting the political power of black voters. *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) (rejecting a state's unrestricted and unlimited power to apply state policy). Nowhere have the Appellants articulated what "state policy" they followed. The only "policy" that they rely upon is a distorted reading of the Voting Rights Act which Appellants

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[18] Section 7(D) of Article XI of the Ohio Constitution requires the maintenance of existing districts to the extent possible given population changes in the decennial period to prevent gerrymandering by whichever political party holds a majority of the apportionment board. *See State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 509 (1942):

> "The objective sought by the constitutional provisions was the prevention of gerrymandering. By . . . adopting self-acting provisions, it was sought to place the function of apportionment in impartial hands and at the same time mark the way so that in the main at least the provisions of the Constitution would work automatically and the apportioning process ordinarily be a mere matter of calculation. *If the proper construction were that the districts fall apart at the end of each decennium, an entirely new adjustment would be necessary and the way for gerrymandering opened up.*"

(Emphasis added). Although Article XI was repealed in 1967, as a result of *Nolan v. Rhodes*, 378 U.S. 556 (1964), *rev'g*, 218 F. Supp. 953 (S.D. Ohio 1963), the new sections of Article XI corrected the unconstitutional infirmities but maintained the fundamental tenets in *Bricker*. *See*, Ohio Const. art. XI (Former Constitutional Provisions).

invoke to override the anti-gerrymandering restrictions of the Ohio Constitution.

Appellants admittedly drew their plan of apportionment to *avoid* the Ohio Constitution. The record is clear —Tilling asserted and testified unequivocally that federal voting rights law required the Board to maximize majority-minority districts at the expense of the Ohio Constitution. "What we have to do next, *not because of the constitution of the State* but because of the U.S. Supreme Court's decisions, is draw minority districts in our urban areas." D. 154, Cleveland Hearing 8/28/92, at 8 (emphasis added). The trial court properly found that "[t]he Board did not purport to devise this rule based on Ohio policy and law; rather, it contended that such a per se [majority-minority] rule is mandated by federal law." App. D at 131a.

In this Court, Appellants plead for deference to their discretion. However, after Congress revised the Act in 1982, a court confronted with a voting rights claim could no longer look at the subjective intent of the decisionmakers. The 1982 amendments made clear the Congressional determination that violations were to be judged by their *effect*, regardless of the underlying *intent* of the state actors. Specifically, the trial court below was required to conduct an objective inquiry analyzing the totality of circumstances. S. Rep. at 28-29, 1982 U.S.C.C.A.N. at 206-07.

For a court to examine the totality of circumstances there must be an adequate factual record to examine. Appellants wished to have it both ways, to cover their bets by submitting "totalities" evidence and at the same time insisting that the trial court required them to do so. They would use the Act as a sword to carve boundary lines diluting black voting strength and as a shield to defend that behavior from scrutiny claiming an exemption from "totalities" analysis and seeking deference to "state policy." The legislative history of the 1982 amendments nowhere suggests that Congress intended to bestow upon the states the discretionary power to apply the Voting

Rights Act against black voters who are political enemies, under the gloss of "state policy."

Even assuming, *arguendo*, that Appellants political purpose of packing black voters was devoid of racial animus and consisted of nothing more than a desire to gain partisan advantage by politically gerrymandering black voters, this is nevertheless an impermissible use of the Act. The Voting Rights Act is a statute exclusively concerned with the protection of minorities; it is not some "all-purpose weapon" [19] for politicians to wield against their enemies.

1. *The Ohio Supreme Court Decision Reached Only the Narrow Issue Raised By a Friendly Counterclaim*

On February 14, 1992, the Ohio Supreme Court issued a sharply divided 4-3 per curiam deicsion in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992), before the Board issued its "technical amendments" on February 18, 1992. The court found "against the *counterclaimants* on their claim that the plan is unconstitutional and, *accordingly*, we find the plan to be constitutional." *Id.* at 200. The counterclaimants were Republican State Senators Henry and Drake, cooperative and friendly to the Appellants, who filed to provide the Appellants with an argument that the state court had jurisdiction to issue an advisory opinion. The only issue raised in the friendly counterclaim was whether Ohio Senate District 32 could be deemed to meet the state constitutional requirements, notwithstanding the fact it failed to meet the population requirements of Section 4 of Article XI. *Id.* All of the Ohio Justices found that the only justiciable issue decided in the dispute before them was the state constitutionality of the populations of Senate District 32 and House District 68. *Id.* at 202, 212, 214-25.[20]

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[19] *Chisom v. Roemer*, —— U.S. ——, 111 S. Ct. 2354, 2369 (1991) (Scalia, J. dissenting).

[20] Chief Justice Moyer said, "[t]here is no other justiciable issue or controversy before us upon which to issue a declaratory judg-

The issue not reached by the Ohio Supreme Court was Appellants argument that they were prevented from following the Ohio Constitution by the requirements of the Voting Rights Act.[21]

III. THE TRIAL COURT PROPERLY REJECTED APPELLANTS' PROPORTIONAL REPRESENTATION STRATEGY

In their brief on remand of February 18, 1992, Appellants adhered to their original views that: (1) the Voting Rights Act must be applied to Ohio; (2) "[w]here opportunities exist, the State, in reapportioning, must configure minority controlled districts;" and (3) they had met all of the "totalities" factors. D. 161 at 83.

To these assertions, they added the argument that the districts of elected black legislators must be reconfigured to guarantee the election of a black candidate, including non-incumbent black candidates in the districts at issue. "The Board concluded that while there is a white [sic] crossover voting in the minority districts . . . *there is insufficient black population in the minority districts to guarantee the election of a black candidate* particularly given levels of voter turnout and racial bloc voting in the district." D. 161 at 55 (emphasis added). *Accord*: App. D at 207a.

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ment." 63 Ohio St. 3d at 202. The basis of the dissents of Justices Resnick, Holmes and Sweeney was that the court *failed* to reach the merits of the constitutional claims presented by the Appellants, who were also plaintiffs in *Voinovich*.

[21] "First, plaintiffs argue that required compliance with the federal Voting Rights Act of 1965, Section 1973 *et seq.*, Title 42, U.S. Code, prevented them from retaining some prior districts by requiring them to create as many districts as possible where black voters could be in the majority. However, the January 31, 1992 order of the federal three-judge panel in *Quilter v. Voinovich*, concluded that there was no such legal mandate under the Voting Rights Act, and specifically removed this claim as a possible defense in state proceedings. Therefore, no weight can be accorded to plaintiffs' evidence or argument on this claim." *Voinovich v. Ferguson*, 63 Ohio St. 3d at 224 (Resnick, J., dissenting) (citation omitted).

Without providing a scintilla of evidence, Appellants' "guaranteed safe seats" thesis made several assumptions about the relationship between race and voting in Ohio legislative elections that: (1) the substantial historic white crossover vote will only be available to incumbents; (2) black voters would never consider a white candidate to be their representative of choice; (3) all of the black incumbents are likely to resign or die in the next ten years; and (4) race is the dominant political issue for Ohio voters.

Taking these assumptions to be fact, Dr. King, Appellants' expert, testified that he calculated a rough "incumbency" factor which called for adding from 6-10% black population. J.A. 261.[22] The ostensible purpose of this "incumbency" factor was to guarantee the election of a black candidate even if the incumbent decided not to continue serving the district. D. 147 at 58. King estimated that based on 1990 election results, incumbent black legislators would continue to win by pluralities from 76-89%, and that non-incumbent black candidates would win by pluralities from 69-81%. D. 153, Ex. 112; J.A. 258-59. Dr. King admitted that this approach might appear "at first glance to be packing." J.A. 259.

An analysis of these assumptions and projections makes clear that Appellants set out to guarantee a certain quota of black legislators, as though there were a black entitlement to a certain proportional representation in the state legislature. However, as the trial court noted and found, Ohio's legislative electoral history makes it clear that the Appellants had set out to fix something which most demonstrably was not broken. App. D at 132a.

The record established that Democratic legislators have been more sensitive to issues of concern to black

[22] King testified that the incumbency factor is "something less than around 10%." J.A. 259. Later he said it was "between roughly six and roughly ten percent." J.A. 261. When asked what the incumbency factor was for Representative Mallory he was unable to give a definitive answer to the question. J.A. 261-62.

voters than Republican legislators. For this reason, black voters in Ohio have tended to vote overwhelmingly for Democratic candidates, whether those candidates be black or white. Undisputed evidence established that legislative districts with 13% or more black population tended to elect Democratic legislators, that districts which had 35% or more black population tended to elect black legislators, and that every black incumbent legislator was Democratic.

Rather than calling upon Republican legislators to show greater sensitivity upon issues of concern to black voters, the Appellants sought to neutralize the impact of the coalition which had been established between black voters and white Democrats. One method chosen was to cram as many black voters as possible into those districts where blacks already controlled the election. A second method was to cram Democratic voters as greatly as possible into those districts likely to be controlled or greatly influenced by Democratic voters. The third method was to purge suburban districts to the greatest extent possible of black population and voters. It was not coincidental that a policy of "maximizing" the number of majority-minority districts combined elements of all three of these strategies.

The biggest obstacle to the Appellants' policy and strategy were the anti-gerrymandering provisions of the Ohio Constitution, particularly those provisions which required maintenance of those districts which otherwise met the population standards set forth by the Constitution's language. App. I at 282a (§ 7(D)). Since no provisions of either Ohio law or judicial precedent permitted pursuit of this partisan strategy, the Appellants seized upon a deliberately distorted interpretation of the federal Voting Rights Act as the vehicle most likely capable of transporting their partisan strategy across the Ohio Constitutional impediments.

Appellees challenged the permissibility of such a cynical manipulation of federal voting rights laws designed to protect minority voters. This manipulation led to: (1) wast-

ing black votes by needlessly packing blacks into districts already controlled by black voters; and (2) compromising black political effectiveness by guaranteeing that black voters not crammed into packed districts were sufficiently fragmented and dispersed to keep the black population below the 10% threshold wherever possible. *See* Charts A & B.[23] As a result of Appellants' race-based partisan gerrymandering strategy, their plan reduced the number of influence districts with 10-50% black population from twenty-three to eleven and increased the number of districts with less than 10% black population from twenty-two to thirty-one. J.A. 198-99.

Appellants' partisan gerrymander strategy required that they assert an obligation to "maximize" the number of minority districts, and this obligation led to implementation of a proportional representation policy, one in which a certain minimum number of districts would be guaranteed "safe" for the election of minority candidates. Both the proportional representation pursued and the quota of "safe" seats created are inconsistent with the clear intent of Congress[24] and the opinions of this Court interpreting the Act.[25]

The trial court took note of the fact that the absence of legally significant racial bloc voting combined in Ohio

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[23] Charts A & B show that blacks were packed into five districts (21, 22, 30, 31, 49) and fragmented into fifteen districts (23-29, 32-34, 36-37, 50-52) when previously these black voters were electing black representatives with very substantial white crossover vote and white representatives iwth voting records of 90-100% on issues of concern to black voters.

[24] "[N]othing in Section 2 establishes a right to have members of a protected class in numbers equal to their proportion of the population" 42 U.S.C. § 1973(b).

[25] "Under the results test, the cases never required proportional representation and invariably repudiated it." S. Rep. at 33, 1982 U.S.C.C.A.N. at 210; *see, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980); *United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977); *White v. Regester*, 412 U.S. 755, 767 (1973); *Whitecomb v. Chavis*, 403 U.S. 124, 149-50 (1971).

with strong black-white coalitional voting patterns to elect sufficient black legislators to equal or exceed the number that would have been produced had proportional representation been legally permissible. Thus, the record established and the court below found, Appellants employed tactics which not only failed to *advance* minority voting rights, but which actually attempted to *destroy* the coalitional voting which had succeeded in enhancing black political participation and influence in Ohio legislative elections. This led the trial court to quote the text of the Voting Rights Act that explicitly rejects proportional representation. App. D at 142a (quoting 42 U.S.C. § 1973(b)).

IV. APPELLANTS' ADMITTED RACE-BASED MANIPULATION OF DISTRICTS WHICH DILUTED MINORITY VOTING STRENGHTH FOR REPUBLICAN POLITICAL ADVANTAGE VIOLATES THE FIFTEENTH AMENDMENT

When a state "singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960). Racial gerrymandering is a form of racial discrimination violative of the Fifteenth Amendment. *Id.* at 342. When state action, such as a plan of apportionment, is "motivated by a discriminatory purpose," the Fifteenth Amendment is violated. *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). A discriminatory purpose is proved where the plaintiffs can show that the state plan of apportionment was "motivated by racial considerations or in fact drew the districts on racial lines," to discriminate against a minority population. *Wright v. Rockefeller*, 376 U.S. 52, 56-57 (1964). *Accord: Bolden*, 446 U.S. at 63. Indeed, as this Court stated, absent a compelling reason, "government has no business designing electoral districts along racial or religious lines." *Wright*, 376 U.S. at 64 (Douglas, J., dissenting).

Here, Appellants repeatedly admitted and publicly proclaimed that their plan of apportionment *was motivated* by racial considerations. App. D at 142a n.8;

J.A. 13-14, 16, 279-83; D. 48 at 81-82. They admittedly set aside the Ohio constitutional requirements in order to maximize majority-minority districts. App. D at 142a n.8; J.A. 13-14. The uncontroverted results of their plan was to abridge the opportunities of minorities to participate in the political process and elect candidates of their choice (App. D at 141a n.6) for Republican political advantage. *Id.* at 143a & n.9. Appellants, therefore, motivated by a discriminatory purpose properly were found by the trial court to have violated the Fifteenth Amendment in drafting both the 1991 plan and its technical amendments. *Bolden*, 446 U.S. at 62.

Having found that: (1) the Board admitted race-conscious drawing of districts (App. D at 131a); (2) its plan resulted in dilution of minority voting strength (*id.* at 141-42a); and (3) the Board understood and had documents mapping out how Republicans could gain political advantage by "packing" blacks (*id.* at 143a n.9), the trial court properly concluded the Fifteenth Amendment had been violated. Fifteenth Amendment cases are intensely fact specific, and although the sufficiency of proof varies, *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 681 (1991), the trial record here is replete with evidence from which the trial court could and did find that the Board's plan violated the Fifteenth Amendment. *See supra*, pp. 2-15.[26]

A. Appellants Consciously Manipulated Populations With Apparent Indifference to the Effect on Black Voting Strength

Appellants acknowledged that minority districts with less than a majority of the population (as low as 35%) are currently represented by the minority's candidate of choice. J.A. 24. Notwithstanding this knowledge, Ap-

[26] This Court has held it will not overturn a trial court's findings of fact, including a finding of intentional discrimination, unless clearly erroneous. *Rogers v. Lodge*, 458 U.S. 613, 623-24, 627 (1982); *see White v. Regester*, 412 U.S. 755, 767-70 (1973).

pellants admit they purposely added unnecessary black population to those districts. Despite Appellants' claim that their racial motivations were pure, they canont negate the voluminous record which led the trial court to conclude that Appellants intentionally discriminated against minority voters in Ohio—"the Board cannot seriously contend that it did not supply its 'remedy' intentionally and for political advantage in violation of the Fifteenth Amendment." App. D at 142-43a (footnotes omitted). The trial court properly concluded that Appellants' use of the Voting Rights Act to dismantle Article XI of the Ohio Constitution was a pretext for their racial gerrymander.

Appellants deliberately misstate the record below when they argue that the trial court did not make any findings concerning their intent to discriminate. The trial court stated that its task in evaluating Appellants' alleged Voting Rights Act violation was not as difficult as it may seem because,

> "[t]he totality of circumstances reveals coalitional voting between whites and blacks. As a result, black candidates have been repeatedly elected from districts with only a 35% black population. Against this background, the per se requirement of the creation of majority-minority districts has a dilutive effect on black votes—*exactly what the defendants intended.*"

App. D at 141-42a (emphasis added; footnotes omitted).

The very existence of the frequent statewide majority or near majority white crossover vote for black candidates requires the plan drawer to take particular care to avoid unnecessarily packing or avoidably diluting minority voting strength. App. D at 141a n.6. Moreover, the size of the white crossover vote provides a measure to "assess what the dividing line is between packing and not packing minority voting strength." *Id.*; J.A. 147. Appellants did not make a reasoned effort to determine what that dividing line was. Instead, they simply ignored the statistics which show coalitional voting and the absence of legally significant racial bloc voting. Elections where

a majority or near majority of whites voted for black candidates, along with a majority of blacks, is the exact opposite of racially polarized voting. Bernard Grofman et al., *The 'Totality of Circumstances Test' in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 Law & Pol'y 199, 207 (1985).

Appellants admitted their policy was to maximize "guaranteed" or "safe" seats for black candidates, and made no showing that any of the districts which they gerrymandered were unsafe—that there was any probability that either an incumbent or successor preferred by blacks would be unable to be elected because of hostile white bloc voting. They made rough guesses about the value of incumbency but failed to demonstrate that those assumptions applied to the election or defeat of a single minority candidate. D. 123 at 87, 89, 90, 102-10; *see* J.A. 308. Tilling did not compare the 1980 and 1990 population figures to determine if in fact there was any "inherent discrimination" in the 1981 districts as a result of applying the provisions of the Ohio Constitution in the prior apportionment. App. A at 12a. Although Tilling was fully aware of the uses of regression analysis and the *Gingles* discussion of racial bloc voting, neither he nor his staff performed any regression analysis, purportedly because he ran out of time. J.A. 12, 32, 34. Moreover, Tilling knew when he drew the plan that 85-95% of the time blacks voted heavily Democratic. J.A. 15.[27]

When racial motives[28] and political motives are mixed, even where race is secondary to political motivation, impermissible discrimination has occurred violative of the Fifteenth Amendment. *Armour v. State*, 775 F. Supp.

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[27] He also failed to assess the responsiveness of legislators to matters of particular concern to the minority community. J.A. 25. The uncontroverted evidence showed that Democrats in Ohio voted favorably 95% of the time while Republicans voted favorably only 64% of the time. J.A. 196.

[28] Tilling admits that black voters were treated differently than whites under his plan; black districts were singularly at issue as Tilling drew his plan. J.A. 16, 58-64.

1044, 1061 (N.D. Ohio 1991).[29] Intentionally diluting the political effectiveness of minority voters in order to benefit a political party violates the Fifteenth Amendment.[30]

B. Appellants Repeatedly Have Failed to State a Lawful Rationale for Their Race-Based Manipulation of Districts

The Board majority started with an unsupported "policy," rather than objective and factual analysis. That policy produced adverse impacts upon minorities and it persists until the present day. The lack of effort to explore critical facts, combined with the repeated effort to substitute Appellants' manufactured "policy" for facts, supports an adverse inference concerning Appellants' motives. This inference is bolstered by the Board majority's claimed ignorance of Tilling's activities, their delegation of all discretion to him, their awareness of the political advantages of race-based district manipulation, and their adherence to a predetermined policy even in the face of proof that there was no legally significant racial bloc voting. App. D at 133a n.2. Circum-

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[29] *Accord: Jeffers v. Clinton*, 740 F. Supp. 585, 589 (E.D. Ark. 1990), *appeal dismissed*, —— U.S. ——, 111 S. Ct. 1076 (1991); *Flanagan v. Gillmor*, 561 F. Supp. 36, 45 n.20 (S.D. Ohio 1982) (An apportionment plan which "uses racial demography as a factor in considering the political complexion of a district, and [results in] a significant diminution of black voting power" gives rise to an "inference of purposeful discrimination."), *aff'd*, 467 U.S. 1223 (1984).

[30] *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("[I]t is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known, and if not changed, intended."); *Garza*, 918 F.2d at 771; *Ketchum v. Byrne*, 740 F.2d 1398, 1406-10 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). Racial gerrymandering claims are justiciable precisely because "there is a direct and immediate relationship between the racial minority's group voting strength in a particular community and the individual rights of its members to vote and to participate in the political process." *Davis v. Bandemer*, 478 U.S. 109, 151 (1986) (O'Connor, J., concurring in the judgment).

stantial evidence may be sufficient to show discriminatory intent under the Fifteenth Amendment. *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. 229, 242 (1976).[31]

Missing from Appellants' argument is a justification for their boundaries " 'based on legitimate considerations incident to the effectuation of a rational state policy.' " *White v. Regester*, 412 U.S. 755, 764 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)). If Appellants had applied a "rational state policy," *i.e.* the Ohio Constitution, the Board could have accomplished legitimate objectives to make the population in districts more equal through nondiscriminatory means. Where a state agency could have accomplished its purported ends through less segregative or less discriminatory means, a court may infer discriminatory intent and a lack of good faith. *See United States v. Fordice*, —— U.S. ——, 112 S. Ct. 2727, 2744 (1992) (O'Connor, J., concurring).

The trial court concluded there was ample evidence that Appellants employed racial gerrymandering for political gain. App. D at 142-43a & n.9.[32] The plan's intentional race-conscious gerrymander impermissibly minimized black voting strength in violation of the Fifteenth Amendment. *Gomillion*, 364 U.S. at 346. *Accord: Robinson v. Commissioners Court*, 505 F.2d 674, 679 (5th Cir. 1974) ("The most crucial and precise instrument of the . . . denial of the black minority's equal access to political participation, however, remains the gerrymander of precinct lines so as to fragment what could otherwise

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[31] *Accord: Collins v. City of Norfolk*, 605 F. Supp. 377, 406-07 (E.D. Va. 1984), *aff'd*, 768 F.2d 572 (4th Cir. 1985), *vacated on other grounds*, 478 U.S. 1016 (1986).

[32] *See supra* pp. 4, 6-7, 8-10 (discussing testimony and documents regarding the political advantages of racial gerrymandering and the racially discriminatory effects of the plan).

be a cohesive minority voting community."). It was not coincidental that "Republican Opportunities" detailed a strategy that closely paralleled what Tilling did in packing and fragmenting blacks in Hamilton, Franklin and Montgomery County districts. "[T]he Fifteenth Amendment does not simply guarantee the individual's right to vote; it also limits the State's power to draw political boundaries." *Bolden*, 446 U.S. at 85 (Stevens, J., concurring).

V. THE SOLICITOR GENERAL'S CALL FOR RACIAL BLOC VOTING AS AN UNCONDITIONAL PREREQUISITE TO A SECTION 2 CLAIM IS SILENCED BY THE SENATE REPORT AND THIS COURT'S PRECEDENT

The Solicitor General would mechanically apply the three preconditions of *Gingles*, which addressed multi-member districts, to the circumstances of this case involving single-member districts. He thereby would forbid Appellees' racial gerrymander claim under Section 2 because there was no finding of legally significant racial bloc voting in Ohio. This position ignores the holding of *Gingles*, the intent of Congress to extend Section 2 to areas without proven histories of discrimination, and the cases condemning racial gerrymandering as a discriminatory "device," regardless of racial bloc voting. It also ignores the admonition of Congress against "mechanical point counting" [33] when applying the Act and the prohibition in the Act against the use of *any* voting practice or procedure that results in dilution of minority voting opportunity. The Solicitor General alternatively argues, with no apparent regard for the facts of this case, that a state is entitled to choose the policies and goals it wants reflected in its apportionment plan. Amicus Curiae of Solicitor General at 13 (S.G.). Yet, Appellants ignored the Ohio Constitution's apportionment requirements and limitations in the name of remedying prior dilution of minority voting strength under the Voting Rights Act.

[33] S. Rep. at 29 n.118, 1982 U.S.C.C.A.N. at 207 n.118.

Thus, the Solicitor General's "local discretion" argument is without merit unless this Court is prepared to hold that state *officials* may ignore the provisions of their state *constitution* and *laws*.

In *Gingles*, this Court specifically stated that it had no occasion to consider whether the standards which it applied to the multimember claim were pertinent "to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember *or single-member districts* resulted in the dilution of the minority vote." 478 U.S. at 46 n.12 (emphasis added). Moreover, though conveniently ignored by the Solicitor General and Appellants, *Gingles* expressly acknowledged that vote dilution may result from racial gerrymandering. "Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Id.* at 46 n.11. The "dispersal" this Court rejected in *Gingles* is identical to the "fragmenting" the trial court held impermissible in this case. The "concentration" this Court disapproved in *Gingles* is on all fours with the "packing" invalidated by the court below. Thus, *Gingles* hardly can be said to stand for the proposition that charges of racial gerrymandering cannot be brought under Section 2, even in areas without a proven history of racial bloc voting.[34]

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[34] When Congress was considering the 1982 amendments it addressed the issue of whether Congressional authority to enact Section 2 was "contingent upon a detailed showing of voting rights discrimination throughout the country." S. Rep. at 41, 1982 U.S.C.C.A.N. at 219. The contingency argument was rejected because it "overlook[ed] Supreme Court decisions subsequent to *South Carolina* [*South Carolina v. Katzenbach*, 383 U.S. 301 (1966)] indicating that Congress can use its Fourteenth and Fifteenth Amendment powers to enact legislation whose reach includes those [jurisdictions] without a proven history of discrimination." *Id.* at 42, 1982 U.S.C.C.A.N. at 220 (citing *Oregon v. Mitchell*, 400 U.S. 112 (1970)). The Report concluded that even "in the absence of a de-

The Solicitor General's argument, in essence, is that Section 2 should not be applied in the absence of a proven record of voting discrimination in the state, *i.e.* historic racial bloc voting. The Senate Report negates the view that any one of the totalities factors, including racial bloc voting must be proved. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. Carried to its logical extreme, the argument would give jurisdictions that had no such racial history a green light to begin engaging in discrimination against minority voters. The Solicitor General also conveniently ignores that his argument that no racial bloc voting existed, directly contradicts Appellants' claim that he purports to support.

The Act disallows *any* state action resulting in "denial or abridgment" of the right to vote on account of race. Indeed, the Solicitor General concedes, as he must, that a state's creation of majority-minority districts "could under some circumstances result in unlawful vote dilution" (S.G. at 10); he therefore must concede that those "circumstances" occur when the "result" is denial or abridgement of voting strength on account of race, the precise finding made by the court below. Since *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960), racial gerrymandering has been recognized as a "sophisticated" mode of racial discrimination, one as equally prohibited as the "simple-minded" discrimination it succeeded. The Senate Report also condemned racial gerrymandering, noting that since 1965 there had been "increased use of the dilution methods addressed by the Supreme Court in *Allen* [*Allen v. Board of Elections*, 393 U.S. 544 (1969)] and *Perkins* [*Perkins v. Mathews*, 400 U.S. 379 (1971)]." S. Rep. at 7, 1982 U.S.C.C.A.N. at 184. *Allen* and *Perkins*, the Report said, involved techniques "which could even in subtle or indirect ways, infringe the right of minority citizens to vote and to have their vote fully count, *e.g.*, gerry-

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tailed record of nationwide voting discrimination," Section 2 was constitutionally permissible. *Id.* at 43, 1982 U.S.C.C.A.N. at 221.

mandering or abolition of electoral posts." S. Rep. at 6-7, 1982 U.S.C.C.A.N. at 183.[35]

Under the Solicitor General's theory, assuming that all of the "subtle stratagems" of minority vote dilution, discussed in *Allen*, were put in place in Ohio and that all of them had a discriminatory effect on black voters, there still could be no violation of Section 2 because there has been no history of racial bloc voting in Ohio. The effect of the theory is to make racial bloc voting a near talismanic prerequisite to a Section 2 violation, in direct contravention of the Senate Report's admonition that no single factor is determinative. S. Rep. at 29 n.118, 1982 U.S.C.C.A.N. at 207 n.118 The Report requires unequivocally that the "relevant factors in a particular case" guide the result. *Id.* The further effect of the Solicitor General's theory is to allow facially neutral violations of the Voting Rights Act to be proven only in a Section 5 state, or in states with other similar simple-minded forms of discrimination.

The Solicitor General's argument, that no Section 2 violation can occur without racial bloc voting, ignores those cases where electoral "practices" may appear facially neutral but have an adverse effect on a small minority group's ability to participate effectively in the political process. In *Chisom v. Roemer*, —— U.S. ——, 111 S. Ct. 2354, 2365 n.24 (1991), this Court made clear that a small minority group continues to be protected by Section 2; to conclude otherwise, according to this Court, is to assume erroneously "that a small group of voters

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[35] *Allen* held that the Voting Rights Act "was aimed at the subtle as well as the obvious state regulations which have the effect of denying citizens their right to vote because of their race." 393 U.S. at 565. Among the subtle stratagems that *Allen* discussed were (1) making an important county office appointive rather than elective; (2) increasing the difficulty for an independent candidate to gain a position on the general election ballot; (3) providing that no person who had voted in a primary election may thereafter be placed on the ballot as an independent candidate in a general election; and (4) creating new procedures for casting write-in votes. *Id.* at 569-70.

can never influence the outcome of an election." Thus, racial bloc voting cannot be applied as an indispensable prerequisite to a Section 2 claim.

In Ohio, where black voters have repeatedly elected their preferred candidates from districts with as little as 35% black population, coalitional voting exists because of substantial white crossover voting. App. D at 141a. Thus, a policy to maximize the creation of majority-minority districts in Ohio, whether under the guise of a per se requirement of federal law or pursuant to "state policy" as the Solicitor General fallaciously suggests, is nothing short of intentional packing and fragmenting of black voters.[36] See *Gingles*, 478 U.S. at 94-95.

The first precondition of *Gingles*, *i.e.*, that blacks must constitute a sufficient population to make up a majority in a district is also presented by the Solicitor General as a per se requirement for single-member districts to bring a vote dilution claim. The argument ignores the factual premise upon which the first precondition in *Gingles* was established. In North Carolina, a Section 5 state where race was the predominant political issue, breaking up a multimember district unable to amass 50% black population would not change the status quo because blacks would still not be able to elect their preferred candidate. *Gingles*, 478 U.S. at 63.

In Ohio, however, even the Appellants concede that blacks have been regularly elected in districts with as low

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[36] *See Williams v. City of Dallas*, 734 F. Supp. 1317, 1415 (N.D. Tex. 1990) (concluding that plaintiffs had established a Section 2 vote dilution claim in part because the packing of blacks into two districts with 75-87% black concentration and 85-91% black and Hispanic population, and the submersion of the remaining black population into nearly all white districts prevented the creation of a third black district); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1147, 1157-58 (N.D. Ill. 1983) (court requested redrawing of districts with 75-78% black concentration and 85-91% black and result in vote dilution); Kimbal Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 L. & Pol'y 43, 44 (1988) (supporting the creation of additional districts where possible to "extend the influences of blacks").

as 35% black population. Hence, there is no need to aggregate black voters in excess of 50% in Ohio's state legislative districts, thereby fragmenting other black voters, in order for them to elect a representative of choice. Where the result of such excessive aggregation is dilution, as is the case here, those minority voters remain entitled to Section 2's protection regardless of whether they can constitute a majority. *Chisom*, 111 S. Ct. at 2365 & n.24. The premise that blacks in Ohio cannot elect state legislators of their choice without a majority-minority district is simply unsupported in the record. To the extent the Solicitor General contends that those black voters fragmented by the Appellants' plans cannot bring a Section 2 claim because they cannot form a majority district, he assumes that those voters could not have influenced the outcome of an election, which, according to *Chisom*, is an "erroneous" assumption. *Id.* at 2365 n.24.

Finally, the Solicitor General's argument that Appellants may apply state policy and engage in activity that courts are precluded from is irrelevant in this case. Here, unlike *Wise v. Lipscomb*, 437 U.S. 535, 539-41 (1978), the Board violated the Ohio Constitution, its only source of apportioning authority. The state policy expressed in the Ohio Constitution, that existing boundaries must be observed, was repeatedly violated, a fact which cannot be justified by reference to the Voting Rights Act. Nonetheless, it is disingenuous for the Solicitor General to suggest that the trial court invalidated the plan simply because it maximized majority-minority districts; the court after considering the totality of circumstances found that maximizing majority-minority districts dilutes black voting strength in Ohio in violation of Section 2. App. D at 141-42a.

VI. APPELLANTS' PLAN EXCEEDING TEN PERCENT POPULATION DEVIATION CANNOT BE JUSTIFIED BY ADHERENCE TO STATE POLICY AND THUS VIOLATES THE FOURTEENTH AMENDMENT'S ONE PERSON ONE VOTE REQUIREMENT

To meet the requirements of the Equal Protection Clause, this Court has consistently held that state bicameral apportionment must be completed on a population basis with an "honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable*." *Reynolds v. Sims*, 377 U.S. 533, 577 (1964). A deviation percentage that is permissible in one state may not be permissible in another, "depending on the particular circumstances of the case." *Id.* at 578. While the Equal Protection Clause does not require "mathematical exactness or precision" (*id.*), it does require that deviations in fashioning a state apportionment scheme occur as a result of "legitimate" and "rational" state policy such as maintaining the integrity of political subdivisions, compactness and contiguity. *Id.* at 579. *Accord: Connor v. Finch*, 431 U.S. 407, 419 (1977); *Mahan v. Howell*, 410 U.S. 315, 328-29 (1973). Contrary to *Mahan*, 410 U.S. at 326, where the plan "produce[d] the minimum deviation above and below the norm, keeping intact political boundaries," the policy pursued by Appellants ignored political boundaries and needlessly exceeded the 10% limit on population deviation.

A total population variance greater than 10% creates a prima facie case of discrimination which must be justified by the State. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983). The total population variance under Appellants' plan is 13.8%. Appellants' Brief at 45 n.40. The trial court properly assessed, and rejected as "erroneous" and as violative of the Equal Protection Clause, Appellants' reliance on "state policy" to justify their greater than 10% population variance in House and Senate Districts. App. D at 148a. Appellants' application of "state policy" was neither consistent nor neutral, and thus was properly rejected by the trial court as justification for

the plan's population deviation. *Id.*; *see Brown*, 462 U.S. at 844-45.

Article XI, §§ 3 and 4 of the Ohio Constitution mandate a total population deviation of 10% from the ideal ratio. App. I at 280-81a (§§ 3 & 4). In addition to §§ 3 and 4, four other provisions of the Ohio Constitution clearly set forth the controlling policy for the apportionment of Ohio's House Districts. App. I at 281-82a (§ 7(A)-(D)).[37] Instead of complying with each of the state apportionment policies mandated by the express provisions of the Ohio Constitution, Appellants picked those they would follow and discarded those they would ignore, purportedly based on adherence to Article XI, § 10(B). Appellants' Brief at 43. However, § 10 states expressly in the preamble that §§ 3, 7, 8 and 9 of Article XI "shall govern the establishment of house of representative districts . . . ." App. I at 283a (§ 10).[38]

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[37] Article XI, § 7(A) provides that districts shall be compact and composed of contiguous territory with a boundary line that is continuous and non-intersecting, and where possible shall contain one or more whole counties. App. I at 281-82a. Section 7(B) provides that where whole counties cannot be used to draw districts compatible with § 3 (providing for 10% total deviation from the ideal population ratio), the district shall be formed by "combining the areas of governmental units giving preference in the order named to counties, townships, municipalities, and city wards." App. I at 282a. Section 7(C) provides that where 7(B) cannot be achieved, only one county governmental unit can be divided between two districts "giving preference in the selection of a unit for division to a township, a city ward, a city, and a village in the order named." *Id.* Section 7(D) requires that the new apportionment follow to the extent reasonable, the "district boundaries established by the preceding apportionment." *Id.*

[38] The res judicata issue referenced by Appellants is indefensible. Appellants' Brief at 43 n.39. Justice Holmes was the only member of the majority in the per curiam opinion *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992) who found that the Board majority had standing to assert the constitutionality of their plan. The only issue addressed by the per curiam opinion was that §§ 4, 9 and 11 of the Ohio Constitution are co-equal—no more and no less. *Id.* at 200. Appellees' attempt to remove that case to federal court to address the constitutionality of the plan in light of federal law, was rejected

It is disingenuous for Appellants to assert that they relied on state policy to justify avoiding the ideal population ratio in three House Districts and one Senate District, when they explicitly and unnecessarily ignored the Ohio Constitution on numerous occasions.[39] Such is not the result of "legitimate considerations incident to the effectuation of a rational state policy," addressed in *Reynolds v. Sims*, 377 U.S. at 579-80.

Appellants' repeated, intentional and unnecessary[40] deviations from the requirements of the Ohio Constitution certainly are not consistent or neutral applications of state policy. *See Brown*, 462 U.S. at 844-45,

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for lack of standing. *Id.* at 201 (Moyer, J., concurring). The federal court case, *Quilter v. Voinovich*, now on appeal to this Court was filed to address the failings of the plan under federal law. Res judicata is inapplicable, given the limited issue properly raised and addressed in the *Voinovich* per curiam opinion.

[39] (1) With respect to Article XI, § 7(A), Appellants' plan contained eighteen Ohio counties within whole county districts, where it was possible to place thirty-one Ohio counties within whole county districts. D. 140, Nos. 615-16. (2) Moreover, Appellants ignored § 7(A) in that District 26 is not contiguous. *Id.* at No. 618, D. 114 at 21, Ex. 20 at 22. (3) In Lake County, Appellants failed to draw their districts under § 7(B) which could and should have been done. Instead, the districts were drawn under § 7(C), despite its express language to apply § 7(B) before turning to § 7(C). D. 140, No. 622. (4) On at least 47 occasions more than one governmental unit is divided between two districts in violation of § 7(C). *Id.* at Nos. 624-31. (5) Contrary to § 7(D), Appellants' plan retained only seven House Districts with the same boundaries as the 1981 plan of apportionment. Appellees' submitted plan was able to retain thirty-one districts from the 1981 apportionment and meet each of the constitutional requirements for apportionment in Ohio. *Id.* at Nos. 646-47.

[40] Appellees' plan submitted to the Board on February 18, 1992, although not at issue before the trial court, consistently applied the Ohio constitutional requirements for apportionment and achieved a total population deviation of 10.5%. Where, as shown by Appellees' plan, there exists a better, more consistent means to achieve the state policy with districts "as nearly of equal population as is practicable" (*Reynolds*, 377 U.S. at 577), Appellants' justification based on state policy is properly rejected. *Connor*, 431 U.S. at 420.

848 (O'Connor, J., concurring); *Mahan*, 410 U.S. at 327-28; *White v. Regester*, 412 U.S. 755, 766 n.8 (1973). Appellants' House District variations from the equal population principle resulted from the taint of maximizing the number of "safe" majority-minority districts that packed, fragmented and segregated black voters, and not from consistently applying any state policy. *See Roman v. Sincock*, 377 U.S. 695, 710 (1964) (upholding a state plan where "faithful adherence" to population-based representation allowed for minor deviation where the circumstances were "free from any taint of arbitrariness or discrimination"). Unlike the circumstances in *Brown*, *Mahan* and *White*, the record before the trial court was replete with Appellants' avoidance of the policies of the Ohio Constitution, where those policies could have and should have been followed to satisfy as nearly as practicable the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons, the decisions of the trial court dated March 10 and 19, 1992 should be affirmed, and Appellants' manipulation of black voters in the name of the Voting Rights Act rejected.

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D. 133 Defendants' Proposed Findings of Fact and Conclusions of Law (Dec. 30, 1991)

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D. 140 Plaintiffs' Proposed Findings of Fact (Jan. 6, 1992)

D. 147 Notice of Filing Record (Feb. 19, 1992)

Ex. B. Apportionment Board Hearing Transcript (Feb. 11, 1992)

Ex. C Apportionment Board Hearing Transcript (Feb. 18, 1992)

D. 154 Joint Trial Exhibits (Feb. 19, 1992)

D. 161 Defendants' Brief on Remand (Mar. 9, 1992)

CHART A

1981 [1]				1991 [2]		
1981 H.D. #	BLACK REP. (TERMS)	BLACK POP. %	1990 WHITE CROSS-OVER VOTE %	# OF DISTS. 1981 DISTS. SPLIT INTO	1991 PACKED H.D. # (BLACK POP.%)	1991 FRAGMENTED H.D. # (BLACK POP. %)
29*	R. MILLER (6) FRANKLIN COUNTY	38.5	44.5	5	21 (55.7%) 22 (48.0%)	25 (8.4%) 26 (8.5%) 27 (3.5%)
31	O. BEATTY (7) FRANKLIN COUNTY	46.8	50.3	5	21 (55.7%) 22 (48.3%)	23 (8.3%) 25 (8.5%) 27 (3.5%)
23	W. MALLORY (13) HAMILTON COUNTY	45.9	50.7	5	30 (60.9%) 31 (59.6%)	33 (8.0%) 34 (2.6%) 36 (4.1%)
25	H. RANKIN (8) HAMILTON COUNTY	53.2	50.9	5	30 (60.9%) 31 (59.6%)	33 (8.0%) 36 (4.1%) 37 (2.1%)
45*	C. JONES (12) LUCAS COUNTY	41.7	44.5	3	49 (50.6%)	51 (2.4%) 52 (5.7%)

* Could have been retained in accordance with the Ohio Constitution's population requirements. J.A. 206.

[1] J.A. 308.

[2] J.A. 193-95, 197; D. 140, Ex. 1.

CHART B

1981 [1]				1991 [2]		
1981 H.D. #	WHITE REP.	PREV. BLACK POP. %	VOTING RECORD ON MINORITY ISSUES %	# OF DISTS. 1981 DISTS. SPLIT INTO	1991 PACKED H.D. # (BLACK POP. %)	1991 FRAGMENTED H.D. # (BLACK POP. %)
30	M. STINZANO FRANKLIN COUNTY	12.4	100	6	21 (55.7%) 22 (48.0%)	23 (8.3%) 27 (3.5%) 28 (4.3%) 29 (3.7%)
32*	D. CONLEY FRANKLIN COUNTY	26.6	100	4	22 (48.0%)	23 (8.3%) 24 (4.2%) 25 (8.4%)
24	T. TRANTER HAMILTON COUNTY	32.3	90	5	30 (60.9%) 31 (59.6)	32 (23.9%) 36 (4.1%) 37 (2.1%)
47	B. QUILTER LUCAS COUNTY	13.2	100	3	49 (50.6%)	50 (5.4%) 52 (5.7%)

* Could have been retained in accordance with the Ohio Constitution's population requirements. J.A. 206.

[1] J.A. 178, 332; D. 112, Ex. 17.

[2] J.A. 193-95; D. 140, Ex. 1.

CHART C [1]

1981 H.D. #	BLACK REP. (TERMS)	1990 WHITE CROSS-OVER VOTE %	1981 BLACK POP. %	1991 PLAN BLACK POP. % (1991 H.D. #)	1992 PLAN BLACK POP. % (1992 H.D. #)
23	W. MALLORY (13) HAMILTON COUNTY	50.7%	45.9%	59.8% (31)	49.2% (31)
25	H. RANKIN (8) HAMILTON COUNTY	50.9%	53.2%	61.1% (30)	56.0% (30)
29*	R. MILLER (6) FRANKLIN COUNTY	44.5%	38.5%	48.3% (22)	44.7% (22)
31	O. BEATTY (7) FRANKLIN COUNTY	50.3%	46.8%	55.9% (21)	54.3% (21)
36	R. McLIN (2) MONTGOMERY COUNTY	35.4%	42.1%	54.8% (38)	43.5% (38)
37*	T. ROBERTS (4) MONTGOMERY COUNTY	46.0%	36.1%	32.4% (39)	41.7% (39)
42*	V. SYKES (5) SUMMIT COUNTY	48.8%	35.4%	43.3% (44)	43.1% (44)
45*	C. JONES (12) LUCAS COUNTY	44.7%	41.7%	50.9% (49)	49.9% (49)

* Could have been retained in accordance with the Ohio Constitution's population requirements. J.A. 206.

[1] J.A. 305-08.

Supreme Court, U.S.
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No. 91-1618

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OCTOBER TERM, 1992

GEORGE V. VOINOVICH, Governor of the State of Ohio, *et al.*,

Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

INTRODUCTION

Despite Appellees' many diversions and obfuscations, they, as well as Amici Curiae Congressman Louis Stokes, *et al.*, have failed to defend or explain the basic flaw in the district court's decision: the finding of a § 2 violation because *Appellants* failed to satisfy *their* burden of proof. Imposing such a burden upon apportioning officials, rather than plaintiffs, is completely at odds with the language and purpose of the Voting Rights Act and constitutes a serious interference with state authority.

Furthermore, Appellees have failed to direct this Court's attention to any evidence supporting the district court's belated finding of intentional discrimination in violation of the Fifteenth Amendment. Nor have Ap-

pellees, or Amici Curiae NAACP Legal Defense and Educational Fund, *et al.*, justified the district court's even more belated finding that the 1991 plan of apportionment, as amended, violates the one person-one vote requirement of the Fourteenth Amendment. Consequently, the decisions of the district court must be reversed and this case remanded with instructions to enter judgment in favor of Appellants.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS.

A. As with their *Motion to Dismiss or Affirm*, Appellees attempt to minimize the importance of the district court's shifting of the burden of proof to Appellants. The district court's January 31, 1992 Order, which is amplified and restated in its Orders of March 10 and 19, 1992, however, indisputably requires state redistricting officials to "justify" their construction of minority controlled state legislative districts. In so doing, the district court impermissibly relieved the plaintiffs of the burden of showing minority vote dilution and shifted the burden to defendants by requiring them to show a past violation of § 2 of the Voting Rights Act and/or that their redistricting plan does not presently violate § 2. Although *Appellees' Brief* attempts to trivialize this issue, it is the primary flaw of the district court's decision in this case. Appellees were unable to satisfy their burden of proving their § 2 claim, but nevertheless prevailed before the district court *because* the burden of proof was impermissibly shifted to Appellants.

By shifting the burden of proof to state redistricting officials, the district court in effect stripped those officials of their legitimate discretion to take action consistent with § 2 of the Voting Rights Act. In drafting the plan, Appellants never intended to prove, nor did they have the

legal obligation to prove, that the 1981 apportionment was in violation of the Voting Rights Act. The evidence considered by the Apportionment Board and submitted to the district court by Appellants was never meant to establish such a violation. That evidence was, however, sufficient to induce Appellants to consult extensively with minority groups [1] in an effort to discourage potential plaintiffs from filing a § 2 challenge or, if such challenge was filed, to prevent it from being successful.[2]

Appellees evidently concede Appellants' principal contention—that the district court wrongfully shifted the burden of proof—by their failure to challenge that con-

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[1] Appellees deceptively suggest that this Court should discount Appellants' extensive cooperation with the Ohio NAACP and particularly with its reapportionment project coordinator Floyd Johnson ("Johnson")—as well as its support for Appellants' plan of apportionment—because Johnson was paid to act as a "consultant" for the Ohio Senate. See *Appellees' Brief* at 7-8. In reality, however, Johnson's "consulting contract" with the Ohio Senate was nothing more than an effort to provide funding for Johnson's redistricting activities, which had not been adequately funded by the Ohio NAACP. D. 125 at 57. Moreover, Appellees fail to advise the Court that Johnson was also paid to act as a "consultant" to those responsible for drafting the proposed plan on behalf of Appellees Ferguson and Quilter. D. 73 at 48; D. 125 at 56.

Johnson, *on behalf of the Ohio NAACP*, has unequivocally voiced his support for districts in all of Ohio's counties containing substantial minority population. D. 125 at 58; D. 154, Ex. 16 at 21-24. The National NAACP, as well as several other national minority groups, also apparently support Appellants' construction of these districts. See *Brief of Amici Curiae NAACP Legal Defense and Educational Fund, et al.*, at 12-22.

[2] Appellees evidently contend that Article XI of the Ohio Constitution prohibits the Apportionment Board from pursuing such a policy because "[t]he entirety of Ohio's 'policy' regarding apportionment is set forth in Article XI of the Ohio Constitution . . . ." *Appellees' Brief* at 28. No such question of state law is before this Court, see *infra* at 5-6, and in any event, it is ludicrous to suggest that state officials may not maintain a policy of consulting with affected groups in their efforts to comply with federal law.

tention on its merits. Appellees' sole response on this issue is to mischaracterize Appellants' argument, claiming that we "seek the unreviewable discretion to apply Voting Rights Act provisions . . . ." *Appellees' Brief* at 22. On the contrary, Appellants have never sought power to "apply" the Voting Rights Act at all; we seek to comply with it, exercising redistricting authority in the first instance, subject to subsequent Voting Rights Act challenge.

B. In an effort to obfuscate the basic flaw in the district court's decision, Appellees baselessly suggest that Appellants violated § 2 of the Voting Rights Act, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution in drafting Ohio's 1991 plan of apportionment. Appellees' arguments simply are not supported either in law or fact, and thus serve only to mislead this Court.

1. For example, Appellees attack the 1991 plan of apportionment, *i.e.*, "Amendment C," as though the final amendments to that plan, *i.e.*, "Amendment D" adopted in February, 1992, did not exist.[3] They repeatedly refer to the relative minority populations of the house districts under "Amendment C," without reference to such population figures under "Amendment D." See *Appellees' Brief* at 9-13.[4]

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[3] As noted in *Appellants' Brief*, the Apportionment Board adopted a redistricting plan on October 1, 1991. D. 154, Ex. 16 at 31-32. Minor technical amendments to that plan were adopted on October 3, 1991, and this version of the plan was labeled as "Amendment C." D. 154, Ex. 17 at 9-14. The plan was technically amended on February 18, 1992, pursuant to the instructions of the Ohio Supreme Court and the amended version was labeled as "Amendment D." D. 147, Ex. C at 59. Appellees and the district court refer to "Amendment C" as "the 1991 plan," and "Amendment D" as "the 1992 plan." The 1991 plan of apportionment, as amended on February 18, 1992, will be referred to herein as either "the 1991 plan of apportionment, as amended," or "Amendment D."

[4] See also *Appellees' Brief* at 34 where Appellees refer to their "Charts A & B" in an attempt to show that Appellants' plan of

Similarly, Appellees refer to numerous alleged Ohio Constitutional violations under "Amendment C" while refusing to acknowledge that the Apportionment Board adopted "Amendment D," pursuant to the express instructions of the Ohio Supreme Court, *in order to make technical corrections to the plan.* See *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). Indeed, the district court in this case observed that "*[t]hese [Ohio Constitutional] deficiencies were corrected in the 1992 Plan.*" *Quilter v. Voinovich*, J.A. at 337 (N.D. Ohio May 5, 1992). Appellees simply refuse to acknowledge this fact.

"Amendment D" is the plan now in effect, and the plan under which the June 2, 1992, primary election was conducted. See *Quilter v. Voinovich*, J.A. 333 (N.D. Ohio May 5, 1992). Appellees' efforts to obscure the factual and legal issues in this case by continuing to attack alleged deficiencies in "Amendment C" must, therefore, fail.

2. Furthermore, although Appellees go to great lengths attempting to convince this Court that Appellants completely disregarded Article XI of the Ohio Constitution in drafting the 1991 plan of apportionment, as amended, it must once again be emphasized that these state law issues are not before this Court. The district court abstained on all state law issues, as those issues were before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). *Quilter v. Voinovich*, App. at 15a (N.D.Ohio Jan. 31, 1992). The Ohio Supreme Court issued an order declaring "the plan to be constitutional." *Voinovich*, 63 Ohio St. 3d at 200.[5] Appellees did not seek

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apportionment unlawfully disperses minority voters into districts with less than 10% African American population. Appellees' fail to advise the Court, however, that "Charts A & B" are based on exhibits of Appellees' expert witnesses, which exhibits relate solely to "Amendment C."

[5] Appellees attempt to minimize the effect of the Ohio Supreme Court's opinion by noting that the issues before that Court were

this Court's review of the Ohio Supreme Court's decision. Consequently, no court has found that the 1991 plan of apportionment, as amended, violates Article XI of the Ohio Constitutionn, and thus, these state law issues are not before this Court.

3. In a further and even more distressing effort to detract from the primary issue in this case—the district court's improper shifting of the burden of proof to state redistricting officials—Appellees now endeavor to recast what is truly a political gerrymandering claim as a claim of racial discrimination under § 2 of the Voting Rights Act. Remarkably, Appellees argue that Appellants violated the Voting Rights Act because they failed to create enough districts wherein African Americans constituted at least 13% of the voting age population. Appellees assert that such districts have historically elected a Democrat, and, they seem to suggest, the only white representatives responsive to the needs of the African American community are Democrats. See Appellees' Brief at 3.[6] Appellees simply cannot make out a claim of a § 2 violation on the basis of an allegation that the 1991 plan of apportionment, as amended, will reduce the number of

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limited. The district court in this case, however, abstained on all state law issues *two weeks prior* to the Ohio Supreme Court's decision. Appellees, who had earlier filed but then withdrew their Ohio Constitutional counterclaim in the Ohio Supreme Court action, briefed, but failed to refile their claims as a counterclaim in the Ohio Supreme Court following the district court's decision to abstain. The district court, which issued ten orders following the Ohio Supreme Court's allegedly "narrow" decision, see D. 156, 159, 163 [App. 118a], 169, 173 [App. 127a], 176 [App. 324a], 187, 189, 191, & 194 [J.A. 333], has never departed from its decision to abstain. Appellees' belated effort to revive the very state law claims that have either been resolved or abandoned must, therefore, be rejected.

[6] As noted in *Appellants' Brief*, Floyd Johnson of the Ohio NAACP decried Appellees' efforts to "use" black voters to bolster the incumbencies of white Democrats as "plantation politics" which could no longer be tolerated. D. 147, Ex. B at 62.

white Democrats elected from districts with 13% black voting age population. See *Baird v. Consolidated City of Indianapolis*, —— F.2d ——, 1992 WL 240973, slip op. at *4 (7th Cir. Sept. 30, 1992) ("Section 2 of the Voting Rights Act forbids the 'denial or abridgment of the right . . . to vote on account of race or color.' It is a balm for racial minorities, not political ones—even though the two often coincide. * * * The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.").

Appellees' advancement of this argument merely supports Appellants' contention throughout this litigation that this case was commenced primarily to preserve the lopsided Democratic majority in the Ohio House of Representatives. In essence, Appellees undertake to convince this Court that, despite the evidence that the plan of apportionment is politically fair,[7] Appellants impermissibly politically gerrymandered Ohio's legislative districts. Appellees were unable to prove their claim of political gerrymandering in the court below, and now seek to recast that unsuccessful claim as a claim under § 2 of the Voting Rights Act.

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[7] Dr. Gary King, Professor of Government at Harvard University and Director of the Harvard Data Center, testified that the plan of apportionment, both as adopted on October 3, 1991, and as amended on February 18, 1992, had a partisan bias of zero, *i.e.*, was biased in favor of neither political party. J.A. 217-18, 240-44, 260-61. Even Appellees' evidence based upon a "political index" (which, incidentally again ignores "Amendment D") indicated that Democrats would likely win 41 of 99 Ohio House seats under "Amendment C," while only winning 45 under the plan submitted by Appellees Ferguson and Quilter. Given this evidence, it is not surprising that the district court ignored, and therefore presumably rejected, Appellees' political gerrymandering claim. See *Davis v. Bandemer*, 478 U.S. 109 (1986) (Fourteenth Amendment political gerrymandering claim can only be established if redistricting plan "consistently degrades" a group of voters' opportunity to influence the electoral process as a whole).

4. Furthermore, Appellees once again mischaracterize Appellants' actions as having ignored the commands of the Ohio Constitution in order to create minority controlled districts "wherever possible." This argument is without factual or legal support.

Appellees accomplish this mischaracterization by referring to isolated quotes, taken out of context, wherein Appellant Tilling, Secretary to the Apportioning Persons, explained the process of drawing legislative districts to members of the public. *Appellees' Brief* at 4-5.[8] When asked about these statements in his deposition, Tilling carefully explained that he was merely attempting to introduce this complex subject to members of the public, and that minority controlled districts should be drawn where warranted under the analysis of *Thornburg v. Gingles*, 478 U.S. 30 (1986). D. 102 at 24-27, 29.

Consistent with Tilling's explanation, Appellants have maintained throughout the process of drafting the plan and throughout the course of this litigation that § 2 of the Voting Rights Act simply requires state redistricting officials to avoid the dilution of minority voting strength. *Findings and Conclusions*, App. at 270a (Ohio Apportionment Board Feb. 18, 1992). *It neither requires the creation of minority controlled districts nor prohibits their creation.*[9]

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[8] As properly noted by Amici Curiae NAACP Legal Defense and Education Fund, *et al.*, Tilling's opinion about the requirements of the Voting Rights Act is irrelevant. See *Brief of Amici Curiae NAACP Legal Defense and Education Fund, et al.*, at 14. Rather, the relevant inquiries are whether the Voting Rights Act prohibited the Apportionment Board from drawing minority controlled districts to avoid a successful § 2 challenge, and whether Appellees proved that the 1991 plan of apportionment, as amended, diluted minority voting strength. Appellees themselves apparently concede this point. *Appellees' Brief* at 29 ("The 1982 amendments [to the Voting Rights Act] made clear the Congressional determination that violations were to be judged by their *effect* regardless of the underlying *intent* of the state actors.") (emphasis in original).

[9] Appellees resort to isolated quotes from legal memoranda filed in the district court to suggest in their *Brief* that Appellants have

Indeed, as conveniently ignored by Appellees, the 1991 plan of apportionment, as amended, *i.e.*, "Amendment D," contains only five house districts in which African-Americans constitute a majority of the voting age population. The 1981 plan of apportionment contained four such districts, and the plan proposed by Appellees Ferguson and Quilter contained six.[10] The suggestion, therefore, that Appellants operated under a *per se* rule of creating minority controlled districts is simply not supported by the facts of this case.

C. Appellees have once again asserted that Appellants have waived their argument that the district court impermissibly shifted the burden of proof on Appellees' § 2 claim. In addition to their contention that Appellants waived this argument by not appealing from the district

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only recently adopted this position. See *Appellees' Brief* at 17-18. A thorough review of the briefs filed by Appellants in the district court, however, clearly indicates that we have consistently maintained the position advocated before this Court: Appellees could not prevail on their Voting Rights Act claim unless *they proved* that the districts as drawn diluted minority voting strength. The quotations from Appellants' lower court briefs, which are primarily quotations from cases quoted within the briefs, merely raise a legal defense: even if Appellees were factually correct, *i.e.*, Appellants did create minority controlled districts "wherever possible," existing legal precedent authorized such action. This defense is not inconsistent with the position advocated by Appellants before this Court.

[10] Appellees' accompanying assertion that Appellants have diluted minority voting strength by reducing the number of districts in which African Americans constitute 10% or more of the voting age population is also without merit. Even a cursory comparison of the African American voting age populations of the districts in the various plans conclusively rebuts Appellees' argument that Appellants "packed" as many African American voters into as few districts as possible. Although the number of districts with greater than 10% African-American voting age population was reduced from 27 in the 1981 plan to 21 in "Amendment D," the plan submitted by Appellees Ferguson and Quilter contained only 20 such districts. Table I, contained in the Appendix hereto, shows this comparison.

court's January 31, 1992 Order,[11] however, Appellees now make an equally frivolous argument: they contend that Appellants somehow waived their argument that they need not perform a totality of circumstances analysis prior to their redistricting by "voluntarily" presenting evidence relevant to such analysis to the trial court in this case.[12]

Appellants have maintained throughout this litigation that Appellees bore the burden of proving that the Ohio plan of apportionment violated § 2 of the Voting Rights Act under the totality of the circumstances analysis this Court adopted in *Thornburg*. Indeed, it was not until the district court's January 31, 1992 Order that it was even suggested that Appellants were required to perform such an analysis *as a prerequisite* to redistricting.

It is frivolous to contend, as Appellees do, that because Appellants presented "totality of circumstances evidence" to the trial court in defense of Appellees' § 2 claim, we have somehow waived our argument that the district court improperly shifted the burden of proof to Appellants. Appellees would apparently have this Court hold that only plaintiffs, and not state redistricting defendants, are permitted to present such evidence in a § 2 case, and that the plaintiffs' evidence on these issues can be rebutted only at the risk of "voluntarily" assuming the burden of proof.

D. Finally, Appellees argue that the Appellants impermissibly "packed" African American voters because

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[11] Appellants responded to this contention at pages 5-7 of their *Brief in Opposition to Motion to Dismiss Appeal and to Affirm Ruling of Trial Court* filed on May 15, 1992. No additional response is warranted.

[12] As noted in *Appellants' Brief*, Appellants' initial "totalities analysis" was informal in nature and developed for presentation as defense evidence to the district court. The more formal, detailed analysis undertaken to "justify" the minority controlled districts in the plan upon remand from the district court's January 31, 1992 Order can in no sense be considered "voluntary."

the new districts in which incumbent African American legislators intend to seek reelection contain slightly higher percentages of minority population than their present districts. *Appellees' Brief* at 10-13.[13] This argument is flawed in several respects.

First, the argument presumes that § 2 of the Voting Rights Act requires that redistricting be based upon the incumbencies of particular legislators. Appellants maintain that the Voting Rights Act was designed to protect a class of *voters*, not a class of incumbent legislators. See *Findings and Conclusions*, App. at 235a (Ohio Apportionment Board, Feb. 18, 1992). Dr. King testified that minority incumbent state legislators enjoyed a significant advantage over their election opponents. J.A. 259-62. Given that redistricting should not be based upon the incumbencies of particular legislators, Dr. King's analysis supported the relatively modest increase in minority population in these legislators' districts. J.A. 260.[14]

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[13] A similar argument was made by Amici Curiae Congressman Louis Stokes, *et al. Brief of Amici Curiae Congressman Louis Stokes, et al.*, at 5. We note that Congressman Stokes, as one of the parties with whom Appellants consulted regarding the configuration of minority controlled districts, endorsed the reapportionment of Cuyahoga County, where four of the five minority controlled districts are located, see D. 154, Ex. 16 at 2-12, 20-21. Congressman Stokes now apparently argues that those districts pack African American voters.

[14] Contrary to Appellees' argument, the increases were indeed modest. The African American population in Representatives Jones' district was increased from 41.70% [1981 HD45] to 49.90% (46.42% black VAP) ["Amendment D" HD49]; in Representative Sykes' district from 35.40% [1981 HD42] to 43.07% (39.86 black VAP) ["Amendment D" HD44]; in Representative Roberts' district from 36.10% [1981 HD37] to 41.69% (38.28% black VAP) ["Amendment D" HD39]; in Representative McLin's district from 42.10% [1981 HD36] to 43.50% (40.10% black VAP) ["Amendment D" HD38]; in Representative Mallory's district from 45.90% [1981 HD23] to 49.16% (43.13% black VAP) ["Amendment D" HD31]; in Representative Rankin's district from 53.20% [1981 HD25] to 55.98% (52.72% black VAP) ["Amendment D" HD30];

Second, Appellees' argument, in effect, interprets federal law to require the maximization of minority voting strength. Appellees evidently assert that minorities are *per se* "packed" into a legislative district if that district contains even one more minority voter than is required to reelect an incumbent representative of the minority community's choice. If this approach were adopted, state redistricting officials would be required to perform a detailed statistical analysis to determine the minimum number of minority voters necessary to elect a candidate favored by minority voters in each district with a potentially significant minority population. They would then be mandated to construct districts with those minimum numbers of minority voters, and place "excess" minority population in districts where they might arguably exert some influence on the electoral process. This approach is without any legal support, is fundamentally at odds with the principles of the Voting Rights Act, and is directly contrary to § 2's disavowal of proportional representation.

Third, this argument is inconsistent with Appellees' assertion that racial bloc voting does not exist in Ohio. If racial bloc voting does not exist in Ohio, then Appellees fail to prove their claim of minority vote dilution under

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and in Representative Miller's district from 38.50% [1981 HD29] to 54.30% (48.30% black VAP) ["Amendment D" HD21]. Moreover, the proportion of African American population in four incumbent African American legislators' districts was significantly *decreased* from the 1981 Democrat constructed plan of apportionment. The African American population in Representative Prentiss' district was decreased from 90.05% [1981 HD14] to 65.64% (61.41% black VAP) ["Amendment D" HD8]; in Representative James' district from 74.80% [1981 HD12] to 67.35% (63.42% black VAP) ["Amendment D" HD10]; in Representative Whalen's district from 94.67% [1981 HD16] to 67.25% (65.13% black VAP) ["Amendment D" HD12]; and in Representative Beatty's district from 46.80% [1981 HD31] to 44.68% (40.98% black VAP) ["Amendment D" HD22]. App. 260a-263a. Appellees do not cite these figures because they do not support their assertion that Appellants egregiously packed African American voters into as few districts as possible. See Table I in Appendix hereto.

this Court's analysis in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and African American voters cannot be considered "packed." In the absence of racial bloc voting, the configuration of district lines does not prohibit African Americans from electing a candidate of their choice.

In sum, there is simply no evidence that the 1991 plan of apportionment, *i.e.*, "*Amendment D*," in any way dilutes the voting strength of minorities anywhere in Ohio. Consequently, this Court should reverse the decision of the district court and remand the case with instructions to dismiss Appellees' claim under § 2 of the Voting Rights Act.[15]

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[15] Although Appellants believe that the position advocated by the United States, *i.e.*, that Appellees failed to prove their claim under § 2 of the Voting Rights Act because they do not satisfy the three preconditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986), is a correct one, this Court need not decide this case on that basis. As demonstrated above, the facts of this case simply do not support Appellees' assertions and novel theories of a § 2 violation. In any event, Appellants believe that Appellees, as well as Amici Curiae Congressman Louis Stokes, *et al.*, misconstrue the United States' argument in this regard.

Appellees suggest, at pages 43-44 of their *Brief*, that the United States argues that racial bloc voting must *always* be proven as a precondition to establishing a § 2 claim. We do not understand the United States to make such a sweeping argument. Rather, the government asks the Court to apply the *Thornburg v. Gingles* preconditions only to claims that the drawing of electoral district lines has impermissibly diluted the voting strength of a particular racial group by fragmenting or packing that group's voters. See *Brief of the United States as Amicus Curiae* at 14. Thus, under the United States' view, challenges to voter registration practices, candidate qualification requirements, the location of polling places, and a whole host of other election procedures could presumably be brought under § 2 without any need to satisfy the *Thornburg v. Gingles* preconditions.

Accordingly, Appellees further err in suggesting that the United States' position is inconsistent with this Court's recognition in *Chisom v. Roemer*, 111 S.Ct. 2354 (1991), that even small groups of minority voters are protected by § 2 because such groups could influence the outcome of an election. 111 S.Ct. at 2365 n.24. Appli-

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT.

As noted in the amici curiae briefs of both the United States and the NAACP Legal Defense and Educational Fund, *et al.*, as well as in *Appellants' Brief*, the finding of a Fifteenth Amendment violation simply cannot withstand scrutiny. Once Appellees have failed on their Voting Rights Act claim that Appellants curtailed minority participation in the political process, Appellees must necessarily fail on their Fifteenth Amendment claim that Appellants intentionally discriminated against that minority with respect to that process.

The district court's finding that Appellants intentionally discriminated against minorities in drafting the 1991 plan of apportionment, as amended—a finding that appears to have been almost an afterthought—belies all logic and common sense. Appellants consulted extensively with minority groups throughout the process of drafting the apportionment plan. The Ohio NAACP endorsed the districts in all of Ohio's urban counties, which have now also apparently been endorsed by the National NAACP. See *Brief of Amici Curiae NAACP Legal Defense and Education Fund, et al.*, at 12-22. In addition, the minority districts in Cuyahoga County—which contains four of the five minority-controlled districts under the 1991 plan of apportionment, as amended—have been endorsed by the Black Elected *Democrats* of Ohio ("BEDO"), the Black Elected *Democrats* of Cleveland, Ohio ("BEDCO"), Senator Jeff Johnson (an African American member of the General Assembly from Cuyahoga County), and Rep-

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cation of the *Thornburg v. Gingles* preconditions to one class of § 2 claims—those involving "dilution" challenges to the drawing of district lines—would not undermine the ability of small minority groups to bring other § 2 challenges to electoral procedures or practices that frustrate their equal "opportunity . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

resentative Louis Stokes (an African American member of the United States Congress from Cleveland). The evidence cited by Appellees and the district court simply does not support the extraordinary finding of unconstitutional discrimination against a minority group when so many prominent members of that minority group endorsed the plan of apportionment. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). See also *Fund for Accurate and Informed Representation, Inc. v. Weprin*, — F.Supp. —, 1992 WL 204274, slip op. at *5 (N.D.N.Y. Aug. 19, 1992) ("[Plaintiffs] claim minority vote dilution was caused by defendant's partisan gerrymandering efforts. * * * It is well settled that constitutional claims [under the Fourteenth and Fifteenth Amendments] require proof that the apportionment plan be 'conceived or operated as [a] purposeful device[] to further racial discrimination.' Without a racially discriminatory aim, the purposeful discrimination required under the Constitution cannot be shown.") (citations omitted).

III. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF THE FOURTEENTH AMENDMENT.

The Briefs of Appellees and Amici Curiae NAACP Legal Defense and Educational Fund, *et al.*, fail to support the district court's finding of a Fourteenth Amendment violation. A proper analysis of the Fourteenth Amendment claim requires reversal of that finding.

This Court has long held "that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate v. Mundt*, 403 U.S. 182, 185 (1971). See also *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Accordingly, this Court has concluded that a total population deviation of under 10% is insufficient to make out a *prima facie* case of a Fourteenth Amendment violation. Population deviations of greater than 10% must, however, be justified as reasonably advancing a rational state policy. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

In the present case, the district court merely concluded that because the population deviations exceeded 10%—13.81% total deviation for the Ohio House of Representatives and 10.54% for the Ohio Senate—those districts which are not within plus or minus five percent of the ideal population are invalid. The court, which did not make the finding of a Fourteenth Amendment violation until it issued its March 18, 1992, opinion denying Appellants' request for a stay, failed to analyze this claim within the framework adopted by this Court in *Brown*, *supra* and *Mahan v. Howell*, 410 U.S. 315 (1973).

Initially, it must be noted that Appellees' Fourteenth Amendment claim, as well as the district court's finding of a violation, is based solely upon the population of three house districts and one senate district.[16] Appellees asserted no claim that these districts were slightly "underpopulated" because of any racial or political discrimination. Appellees' belated suggestion to the contrary, see *Appellees' Brief* at 33, is simply an effort to obfuscate this Court's consideration of this issue.

Moreover, it is undisputed that the deviations in these four districts were the result of complying with the antigerrymandering provisions of Article XI of the Ohio Constitution.[17] The three house districts were all created pursuant to Article XI, §§ 9 and 10(B) of the Ohio Constitution. These provisions express the Ohio Constitutional

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[16] It must also be noted that the senate district involved is the senate district expressly validated by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992).

[17] Appellees attempt to discredit this state policy by asserting that the 1991 plan of apportionment is replete with violations of the Ohio Constitution. Once again, however, it must be emphasized that the district court abstained on all state law issues. The Ohio Supreme Court concluded that the plan was consistent with the Ohio Constitution, but instructed the Apportionment Board to make technical corrections to the plan to bring it into full compliance. The Board obeyed those instructions when it adopted "Amendment D" on February 18, 1992.

policy of respecting county boundaries by creating whole-county house districts where reasonably possible. In furtherance of that policy, these sections authorize the Apportionment Board to create a house district from a single whole county when that county's population is within plus or minus 10% of the ideal population.

The constitutional policy of respecting county boundaries by creating whole county house districts where reasonably possible is a rational state policy that was consistently applied by the Apportionment Board. The Apportionment Board created all three house districts possible under §§ 9 and 10(B): House District 5 (Ashtabula County), House District 6 (Fairfield County), and House District 7 (Wayne County). To add population to any of those districts would require the division of another county by severing a relatively small portion of an adjacent county to combine with the whole county. Voters in the small portion of the divided county would, in all likelihood, have very little influence in a district comprised almost entirely of another single county.

Similarly, the senate district invalidated by the district court, Senate District 32, is slightly "underpopulated" as a result of the Apportionment Board's respect of county boundaries. As noted by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992), to add population to Senate District 32 would have required the Apportionment Board to cross county boundaries and violate one or more other provisions of Article XI of the Ohio Constitution. The Ohio Supreme Court held that it would "not order [the Apportionment Board] to correct one constitutional violation by committing another." 63 Ohio St. 3d at 200. Accordingly, the creation of Senate District 32 is also a result of the pursuit of the state policy of respecting county boundaries.

The NAACP Legal Defense and Educational Fund, *et al.*, acknowledge the Apportionment Board's pursuit of this rational state policy, but nevertheless assert that

the total deviation violates the Fourteenth Amendment because the *largest* district was not created pursuant to this policy, *i.e.*, the largest house district (HD 20) is wholly within Cuyahoga County, and presumably could be reduced in population to effect a reduction in total deviation. This assertion, however, incorrectly attributes the Fourteenth Amendment violation to the size of the largest districts, House District 20 and Senate District 1. Both are well within the 105% limit of Article XI, §§ 3 and 4, and account for only a small portion of the total deviations among house and senate districts. The bulk of total deviation is a result of adherence to the express Ohio Constitutional policy of respecting county boundaries where reasonably possible by creating whole county house districts.[18]

The four districts at issue in this case (HD5, HD6, HD7, and SD32) are solely the result of adherence to the rational, and express, state constitutional policy of respecting county boundaries where reasonably possible. Accordingly, the district court's finding of a Fourteenth Amendment violation must be reversed.

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[18] The population of House District 20 is only 4.91% above the ideal population of 109,567, *i.e.*, one house ratio. The smallest house district, House District 5 (Ashtabula County), is 8.90% below the ideal population.

Similarly, the population of Senate District 1, the largest senate district, is only 4.53% above the ideal population of 328,700, *i.e.*, one senate ratio. The smallest senate district, Senate District 32, is 6.01% below the ideal population. Senate District 1 is comprised of three house districts consisting of nine whole counties and part of one county (HD82, HD83, and HD86).

CONCLUSION

For the reasons stated herein and in our opening *Brief*, Appellants respectfully request that this Court reverse the March 10, 1992, March 19, 1992, and the March 31, 1992 judgments of the district court, and remand the case to that court with instructions to enter judgment in favor of the Defendants-Appellants.

Respectfully submitted,

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Dated: October 14, 1992

APPENDIX

APPENDIX

Table I *

1981 Plan		"Amendment D"		Ferguson/Quilter Plan	
District	% Black	District	% Black VAP	District	% Black VAP
16	94.67	12	65.13	12	67.08
14	90.05	10	63.42	16	66.67
12	74.80	8	61.41	14	63.71
25	53.20	9	58.36	13	60.18
31	46.80	30	52.72	28	57.91
23	45.90	21	48.30	21	50.60
36	42.10	49	46.42	33	47.10
45	41.70	31	43.13	19	46.40
29	38.50	22	40.98	36	45.26
37	36.10	11	40.61	45	44.98
42	35.40	38	40.10	42	43.09
15	34.80	44	39.86	37	36.20
24	32.30	39	38.28	55	31.19
53	27.80	64	31.19	15	26.46
32	26.60	32	20.76	34	19.55
17	26.14	54	12.93	32	16.71
50	14.90	61	12.34	50	12.49
18	14.70	33	11.84	61	10.92
19	14.40	73	10.71	20	10.88
47	13.20	66	10.28	1	10.07
59	12.81	1	10.01		
22	12.60				
30	12.40				
27	12.20				
62	11.64				
1	11.15				
52	10.50				

* Compiled from App. 96a-98a, 177a-178a, 185a, 260a-263a; D. 153, Ex. 120.

TABLE OF DOCKET AND EXHIBIT NUMBERS

D. 73 Deposition of Floyd Johnson (Nov. 27, 1991)

D. 102 Deposition of James R. Tilling (Nov. 20, 1991)

D. 125 Deposition of Floyd Johnson (Dec. 10, 1991)

D. 147 Notice of Filing Record (filed Feb. 19, 1992)

Ex. B Apportionment Board Hearing Transcript (Feb. 11, 1992)

Ex. C Apportionment Board Hearing Transcript (Feb. 18, 1992)

D. 154 Joint Trial Exhibits (filed Feb. 19, 1992)

Ex. 16 Apportionment Board Hearing Transcript (Oct. 1, 1991)

Ex. 17 Apportionment Board Hearing Transcript (Oct. 3, 1991)

D. 156 Order (granting leave to file brief) (Feb. 26, 1992)

D. 159 Order (granting leave to file brief) (March 5, 1992)

D. 169 Order (to produce files to special master) (March 16, 1992)

D. 187 Order (instructions to special master) (April 28, 1992)

D. 189 Order (granting motion for status conference) (May 1, 1992)

D. 191 Order (docketing exhibits) (May 5, 1992)

Supreme Court, U.S.
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No. 91-1618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GEORGE V. VOINOVICH, Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the
Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPELLANTS' SUPPLEMENT

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INTRODUCTION

This *Supplement* is filed pursuant to Rule 25.5 of the Rules of this Court. The purpose of this *Supplement* is to advise the Court of the election results for races for seats in the Ohio General Assembly from the November 3, 1992 General Election.

The election resulted in an eight seat gain for Republicans, with the Democrats still controlling the House by a 53 to 46 margin. All eleven African-American

incumbents were successful in their bids for reelection.[1] In addition, a Democrat African-American, Barbara Boyd, defeated a white Republican, Charles Byrne, in the 9th House District. Accordingly, there will be twelve African-Americans in the new Ohio House of Representatives.[2]

With respect to the Ohio Senate, incumbent African-American Democrat Ben Espy was elected to fill the remainder of the unexpired term for the seat to which he was appointed in 1991. He was the only African-American candidate for the Ohio Senate in the November 3, 1992 general election.[3] The Democrats gained one seat in the Senate.

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[1] The African-American incumbents, all Democrats, were: C.J. Prentiss [HD8], Troy James [HD10], Vermel Whalen [HD12], Otto Beatty, Jr. [HD21], Ray Miller [HD22], Helen Rankin [HD30], William Mallory [HD31], Rhine McLin [HD38], Tom Roberts [HD39], Vernon Sykes [HD44], and Casey Jones [HD49]. In footnote 14 of their *Reply Brief*, Appellants erroneously reported that Representative Beatty was seeking reelection in House District 22, and Representative Miller in House District 21. Although these are the districts in which these two incumbents were projected to run, see App. 187a-188a, Representatives Beatty and Miller actually won reelection in House Districts 21 and 22, respectively.

The twelve African-American House members, occupying 12.12% of the seats in the Ohio House, are slightly above the proportion of African-Americans in the state as a whole (roughly 10.65%). App. 40a-46a.

[2] An African-American Republican, Edward Anderson, was defeated by white incumbent Democrat Jane Campbell in the 11th House District, which has a black voting age population of 40.61%. White incumbent Republican Dale Van Vyven defeated white incumbent Democrat Terry Tranter in the 32nd House District, which has a black voting age population of 20.76%. African-American Republicans Lelia King, Norbert Carson, Samuel Garland, and Ray O'Neil, were defeated by African-American incumbent Democrats C.J. Prentiss, Troy James, Vermel Whalen, and Tom Roberts in the 8th, 10th, 12th, and 39th House Districts, respectively.

[3] Senators Johnson and Bowen, who are incumbent African-Americans, do not have to run for reelection until 1994.

Respectfully submitted,

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Dated: November 25, 1992

APPENDIX

CERTIFICATION

I hereby certify that the attached documents entitled "Unofficial Report of Votes for Ohio Senate" and "Unofficial Report of Votes for Ohio House of Representatives" are documents prepared by the Office of the Secretary of State of Ohio and officially maintained therein. These documents contain unofficial totals of votes cast for Ohio House and Senate races in the November 3, 1992, General Election. Official results will not be certified by local boards of election until after the official canvass of returns which begins no sooner than November 14, 1992, and which is likely to be completed no sooner than early December, 1992.

/s/ John F. Bender
JOHN F. BENDER
Chief Elections Counsel
Office of the Secretary of
State of Ohio

UNOFFICIAL REPORT OF VOTES FOR OHIO SENATE
GENERAL ELECTION—NOVEMBER 3, 1992
COMPILED BY SECRETARY OF STATE BOB TAFT

DISTRICT #02	HARTMAN	MONTGOMERY
ERIE **	9,817	9,470
LUCAS **	18,463	34,113
OTTAWA	7,621	11,130
WOOD	16,589	32,919
TOTALS	52,490	87,632
PERCENTAGE OF VOTES	37.46%	62.54%

DISTRICT #04	LEVEY
BUTLER	82,749
PREBLE	11,912
TOTALS	94,661
PERCENTAGE OF VOTES	100.00%

DISTRICT #06	FULLER	HORN
MONTGOMERY **	47,474	102,875
TOTALS	47,474	102,875
PERCENTAGE OF VOTES	31.58%	68.42%

DISTRICT #08	ARONOFF	PORTUNE
HAMILTON **	101,106	39,337
TOTALS	101,106	39,337
PERCENTAGE OF VOTES	71.99%	28.01%

DISTRICT #10	KEARNS	TACKETT
CLARK	32,262	28,465
GREENE	34,826	20,680
MADISON	7,973	4,857
TOTALS	75,061	54,002
PERCENTAGE OF VOTES	58.16%	41.84%

DISTRICT #12	CUPP	HESS
ALLEN	34,033	11,491
AUGLAIZE **	8,690	2,941
CHAMPAIGN	8,251	6,594
DARKE	13,876	7,464
MERCER	12,327	4,996
MIAMI **	6,410	2,706
SHELBY	12,316	5,814
TOTALS	95,903	42,006
PERCENTAGE OF VOTES	69.54%	30.46%

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DISTRICT #14	HERRON	SNYDER
ADAMS	3,492	6,755
BROWN	6,155	8,377
CLERMONT	24,161	35,578
CLINTON	4,819	9,654
FAYETTE	3,194	6,092
HIGHLAND	5,172	9,633
PIKE	5,208	5,189
TOTALS	52,201	81,278
PERCENTAGE OF VOTES	39.11%	60.89%

DISTRICT #15	ESPY	ROSENBAUM
FRANKLIN **	71,441	32,633
TOTALS	71,441	32,633
PERCENTAGE OF VOTES	68.64%	31.36%

DISTRICT #16	MICHAEL	WATTS
FRANKLIN **	49,909	90,101
PICKAWAY **	1,541	2,124
TOTALS	51,450	92,225
PERCENTAGE OF VOTES	35.81%	64.19%

DISTRICT #18	BOGGS	PURATY
ASHTABULA	22,443	18,899
LAKE	44,762	47,096
TOTALS	67,205	65,995
PERCENTAGE OF VOTES	50.45%	49.55%

DISTRICT #20	GROFF	NEY
ATHENS **	3,506	2,814
BELMONT	11,065	21,558
COSHOCTON	6,081	8,856
HOLMES	2,087	5,760
MONROE	2,336	4,943
MORGAN	1,909	4,320
MUSKINGUM	12,006	20,200
NOBLE	1,461	4,146
WASHINGTON	9,004	16,463
TOTALS	49,455	89,060
PERCENTAGE OF VOTES	35.70%	64.30%

DISTRICT #22	DRAKE	FYNN
CUYAHOGA **	34,562	17,707
MEDINA	36,398	20,052
WAYNE	22,262	17,306
TOTALS	93,222	56,065
PERCENTAGE OF VOTES	62.87%	37.13%

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DISTRICT #24	DUNNING	STAKES	SUHADOLNIK
CUYAHOGA **	70,439	8,417	92,427
TOTALS	70,439	8,417	92,427
PERCENTAGE OF VOTES	41.12%	4.91%	53.97%

DISTRICT #26	COMBS	GILLMOR
CRAWFORD	6,592	12,699
LOGAN	4,792	12,388
MARION	12,041	14,152
SANDUSKY	10,296	15,037
SENECA	10,325	14,514
UNION	3,473	10,015
WYANDOT	3,037	6,742
TOTALS	50,556	85,547
PERCENTAGE OF VOTES	37.15%	62.85%

DISTRICT #28	NETTLE	SCHMITZ
PORTAGE	35,420	19,773
SUMMIT **	48,351	19,697
TOTALS	83,771	39,470
PERCENTAGE OF VOTES	67.97%	32.03%

DISTRICT #30	BURCH JR
COLUMBIANA	33,990
GUERNSEY	10,149
HARRISON	6,090
JEFFERSON	28,724
TUSCARAWAS	27,170
TOTALS	106,123
PERCENTAGE OF VOTES	100.00%

DISTRICT #32	HENRY	LATELL JR
GEAUGA	22,694	9,798
TRUMBULL	44,070	59,603
TOTALS	66,764	69,401
PERCENTAGE OF VOTES	49.03%	50.97%

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DISTRICT #01	THOMPSON	
ALLEN	35,585	
TOTALS	35,585	
PERCENTAGE OF VOTES	100.00%	
DISTRICT #02	TERWILLEGER	TURNER
WARREN	28,902	20,366
TOTALS	28,902	20,366
PERCENTAGE OF VOTES	58.66%	41.34%
DISTRICT #03	HORNING	LOGAN
COLUMBIANA	16,703	29,106
TOTALS	16,703	29,106
PERCENTAGE OF VOTES	36.46%	63.54%
DISTRICT #04	GARDNER	SINN
WOOD	33,739	15,498
TOTALS	33,739	15,498
PERCENTAGE OF VOTES	68.52%	31.48%

DISTRICT #05	BOGGS JR	SCHULTZ
ASHTABULA	23,875	16,564
TOTALS	23,875	16,564
PERCENTAGE OF VOTES	59.04%	40.96%

DISTRICT #06	MYERS	OSBORN	SHONK JR
FAIRFIELD	27,753	2,662	16,234
TOTALS	27,753	2,662	16,234
PERCENTAGE OF VOTES	59.49%	5.71%	34.80%

DISTRICT #07	AMSTUTZ	VIMMERSTEDT
WAYNE	26,236	13,443
TOTALS	26,236	13,443
PERCENTAGE OF VOTES	66.12%	33.88%

DISTRICT #08	KING	PRENTISS
CUYAHOGA **	4,157	27,284
TOTALS	4,157	27,284
PERCENTAGE OF VOTES	13.22%	86.78%

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DISTRICT #09	BOYD	BYRNE
CUYAHOGA **	29,849	5,914
TOTALS	29,849	5,914
PERCENTAGE OF VOTES	83.46%	16.54%

DISTRICT #10	CARSON	JAMES
CUYAHOGA **	3,040	19,881
TOTALS	3,040	19,881
PERCENTAGE OF VOTES	13.26%	86.74%

DISTRICT #11	ANDERSON	CAMPBELL
CUYAHOGA **	7,684	32,952
TOTALS	7,684	32,952
PERCENTAGE OF VOTES	18.91%	81.09%

DISTRICT #12	GARLAND	WHALEN
CUYAHOGA **	5,129	30,508
TOTALS	5,129	30,508
PERCENTAGE OF VOTES	14.39%	85.61%

DISTRICT #13	CLINE	JOHANEK	NAGIN	PRINGLE
CUYAHOGA **	3,746	7,052	2,062	18,686
TOTALS	3,746	7,052	2,062	18,686
PERCENTAGE OF VOTES	11.87%	22.35%	6.54%	59.24%

DISTRICT #14	SUSTER
CUYAHOGA **	32,517
TOTALS	32,517
PERCENTAGE OF VOTES	100.00%

DISTRICT #15	MAHNIC JR	WISE
CUYAHOGA **	23,837	29,889
MEDINA **	2,507	3,939
TOTALS	26,344	33,828
PERCENTAGE OF VOTES	43.78%	56.22%

DISTRICT #16	KASPUTIS	SARINGER
CUYAHOGA **	36,704	20,812
TOTALS	36,704	20,812
PERCENTAGE OF VOTES	63.82%	36.18%

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DISTRICT #17	CAIN	MISENCIK	POPOVICH
CUYAHOGA **	24,322	3,585	9,404
TOTALS	24,322	3,585	9,404
PERCENTAGE OF VOTES	65.19%	9.61%	25.20%

DISTRICT #18	COLONNA	SIEDEL
CUYAHOGA **	29,569	22,704
TOTALS	29,569	22,704
PERCENTAGE OF VOTES	56.57%	43.43%

DISTRICT #19	REEVES	SWEENEY
CUYAHOGA **	10,017	36,322
TOTALS	10,017	36,322
PERCENTAGE OF VOTES	21.62%	78.38%

DISTRICT #20	BARNA	MOTTL	OBUCH
CUYAHOGA **	16,042	35,867	2,983
TOTALS	16,042	35,867	2,983
PERCENTAGE OF VOTES	29.22%	65.35%	5.43%

DISTRICT #21	BEATTY JR
FRANKLIN **	25,266
TOTALS	25,266
PERCENTAGE OF VOTES	100.00%

DISTRICT #22	JOHNSTON	MILLER
FRANKLIN **	8,873	26,694
TOTALS	8,873	26,694
PERCENTAGE OF VOTES	24.95%	75.05%

DISTRICT #23	NEAL JR	STINZIANO
FRANKLIN **	10,951	22,818
TOTALS	10,951	22,818
PERCENTAGE OF VOTES	32.43%	67.57%

DISTRICT #24	DAVIDSON	PHILLIPS
FRANKLIN **	30,599	12,791
TOTALS	30,599	12,791
PERCENTAGE OF VOTES	70.52%	29.48%

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DISTRICT #25	MASON	SHULTZ	
FRANKLIN **	25,224	22,246	
TOTALS	25,224	22,246	
PERCENTAGE OF VOTES	53.14%	46.86%	
DISTRICT #26	RYAN	TIBERI	
FRANKLIN **	14,326	30,091	
TOTALS	14,326	30,091	
PERCENTAGE OF VOTES	32.25%	67.75%	
DISTRICT #27	BRIGGS	RYMAN	THOMAS JR
FRANKLIN **	22,883	2,296	27,095
TOTALS	22,883	2,296	27,095
PERCENTAGE OF VOTES	43.78%	4.39%	51.83%
DISTRICT #28	DICUCCIO	MEAD	
FRANKLIN **	14,114	32,322	
TOTALS	14,114	32,322	
PERCENTAGE OF VOTES	30.39%	69.61%	

DISTRICT #29	SCHUCK	SHOEMAKER
FRANKLIN **	28,218	15,800
PICKAWAY **	2,619	2,006
TOTALS	30,837	17,806
PERCENTAGE OF VOTES	63.39%	36.61%

DISTRICT #30	CARNEY	RANKIN
HAMILTON **	8,640	33,012
TOTALS	8,640	33,012
PERCENTAGE OF VOTES	20.74%	79.26%

DISTRICT #31	MALLORY	WALKER
HAMILTON **	21,482	9,905
TOTALS	21,482	9,905
PERCENTAGE OF VOTES	68.44%	31.56%

DISTRICT #32	TRANTER	VAN VYVEN
HAMILTON **	22,034	24,838
TOTALS	22,034	24,838
PERCENTAGE OF VOTES	47.01%	52.99%

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DISTRICT #33	BEDINGHAUS	LUEBBERS
HAMILTON **	17,971	20,088
TOTALS	17,971	20,088
PERCENTAGE OF VOTES	47.22%	52.78%

DISTRICT #34	ANDERSON	WINKLER
HAMILTON **	14,977	37,293
TOTALS	14,977	37,293
PERCENTAGE OF VOTES	28.65%	71.35%

DISTRICT #35	BLESSING JR
HAMILTON **	36,848
TOTALS	36,848
PERCENTAGE OF VOTES	100.00%

DISTRICT #36	SCHULER	STIDHAM
HAMILTON **	35,665	15,391
TOTALS	35,665	15,391
PERCENTAGE OF VOTES	69.85%	30.15%

DISTRICT #37	JOHNSON	O'BRIEN
HAMILTON **	15,018	37,916
TOTALS	15,018	37,916
PERCENTAGE OF VOTES	28.37%	71.63%

DISTRICT #38	HUSTED	MCLIN
MONTGOMERY **	9,078	26,504
TOTALS	9,078	26,504
PERCENTAGE OF VOTES	25.51%	74.49%

DISTRICT #39	O'NEAL	ROBERTS
MONTGOMERY **	9,375	26,321
TOTALS	9,375	26,321
PERCENTAGE OF VOTES	26.26%	73.74%

DISTRICT #40	HART	JACOBSON
MONTGOMERY **	22,005	26,505
TOTALS	22,005	26,505
PERCENTAGE OF VOTES	45.36%	54.64%

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DISTRICT #41	BELL	MOTTLEY
MONTGOMERY **	22,309	28,629
TOTALS	22,309	28,629
PERCENTAGE OF VOTES	43.80%	56.20%

DISTRICT #42	CORBIN	SMALLWOOD	SMITH
MONTGOMERY **	27,472	19,439	2,312
TOTALS	27,472	19,439	2,312
PERCENTAGE OF VOTES	55.81%	39.49%	4.70%

DISTRICT #43	BROWN	NETZLEY
MIAMI **	12,087	18,991
MONTGOMERY **	6,957	8,369
TOTALS	19,044	27,360
PERCENTAGE OF VOTES	41.04%	58.96%

DISTRICT #44	DENHOLM	SYKES
SUMMIT **	8,803	24,513
TOTALS	8,803	24,513
PERCENTAGE OF VOTES	26.42%	73.58%

DISTRICT #45	DOTY	FINK
SUMMIT **	29,292	26,743
TOTALS	29,292	26,743
PERCENTAGE OF VOTES	52.27%	47.73%

DISTRICT #46	JONES	WATKINS
SUMMIT **	30,314	25,000
TOTALS	30,314	25,000
PERCENTAGE OF VOTES	54.80%	45.20%

DISTRICT #47	REED	WILLIAMS
SUMMIT **	11,530	28,205
TOTALS	11,530	28,205
PERCENTAGE OF VOTES	29.02%	70.98%

DISTRICT #48	ROMAN	SEESE
PORTAGE **	5,951	7,294
SUMMIT **	19,010	21,372
TOTALS	24,961	28,666
PERCENTAGE OF VOTES	46.55%	53.45%

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DISTRICT #49	JONES	PACKARD
LUCAS **	25,344	5,127
TOTALS	25,344	5,127
PERCENTAGE OF VOTES	83.17%	16.83%
DISTRICT #50	LIPINSKI	QUILTER
LUCAS **	10,969	22,563
TOTALS	10,969	22,563
PERCENTAGE OF VOTES	32.71%	67.29%
DISTRICT #51	GREENWOOD	SCHWARTZ
LUCAS **	30,224	15,568
TOTALS	30,224	15,568
PERCENTAGE OF VOTES	66.00%	34.00%
DISTRICT #52	CZARCINSKI	PERZ
LUCAS **	21,307	29,301
TOTALS	21,307	29,301
PERCENTAGE OF VOTES	42.10%	57.90%

DISTRICT #53	MYLANDER	OPFER
ERIE **	9,735	11,192
LUCAS **	3,269	5,881
OTTAWA	6,391	12,868
TOTALS	19,395	29,941
PERCENTAGE OF VOTES	39.31%	60.69%

DISTRICT #54	HEALY	SCHIFFER
STARK **	25,878	12,408
TOTALS	25,878	12,408
PERCENTAGE OF VOTES	67.59%	32.41%

DISTRICT #55	JOHNSON	MILINI
STARK **	33,532	15,966
TOTALS	33,532	15,966
PERCENTAGE OF VOTES	67.74%	32.26%

DISTRICT #56	MAIER	MYERS
STARK **	31,188	17,661
TOTALS	31,188	17,661
PERCENTAGE OF VOTES	63.85%	36.15%

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DISTRICT #57	CARR	HOOD
CARROLL	5,671	6,129
MAHONING **	11,711	10,058
STARK **	8,161	6,285
TOTALS	25,543	22,472
PERCENTAGE OF VOTES	53.20%	46.80%

DISTRICT #58	NEIN	STOKER
BUTLER **	29,384	15,540
TOTALS	29,384	15,540
PERCENTAGE OF VOTES	65.41%	34.59%

DISTRICT #59	FOX	JOHNSTON
BUTLER **	29,910	15,285
TOTALS	29,910	15,285
PERCENTAGE OF VOTES	66.18%	33.82%

DISTRICT #60	DAY	KREBS
BUTLER **	12,565	12,442
PREBLE	7,640	9,147
TOTALS	20,205	21,589
PERCENTAGE OF VOTES	48.34%	51.66%

DISTRICT #61	KOZIURA
LORAIN **	33,060
TOTALS	33,060
PERCENTAGE OF VOTES	100.00%

DISTRICT #62	BAIRD	BENDER
LORAIN **	21,858	27,000
TOTALS	21,858	27,000
PERCENTAGE OF VOTES	44.74%	55.26%

DISTRICT #63	RENCH	WALSH
ERIE **	6,012	7,501
HURON **	11,455	7,249
LORAIN **	7,102	10,755
TOTALS	24,569	25,505
PERCENTAGE OF VOTES	49.07%	50.93%

DISTRICT #64	HAGAN	SUBRAMANIAN
MAHONING **	34,103	5,507
TOTALS	34,103	5,507
PERCENTAGE OF VOTES	86.10%	13.90%

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DISTRICT #65	GERBERRY	MCCABE
MAHONING **	42,467	13,373
TOTALS	42,467	13,373
PERCENTAGE OF VOTES	76.05%	23.95%

DISTRICT #66	PIGOTT	SAFFOLD	VERICH
TRUMBULL **	5,369	6,918	31,549
TOTALS	5,369	6,918	31,549
PERCENTAGE OF VOTES	12.25%	15.78%	71.97%

DISTRICT #67	LUCAS
TRUMBULL **	39,634
TOTALS	39,634
PERCENTAGE OF VOTES	100.00%

DISTRICT #68	DOLAN	GRENDELL
GEAUGA	15,002	19,722
TRUMBULL **	3,627	3,876
TOTALS	18,629	23,598
PERCENTAGE OF VOTES	44.12%	55.88%

DISTRICT #69	LITTERST	SINES
LAKE **	15,522	26,246
TOTALS	15,522	26,246
PERCENTAGE OF VOTES	37.16%	62.84%

DISTRICT #70	SCHULZ	TROY
LAKE **	17,281	28,040
TOTALS	17,281	28,040
PERCENTAGE OF VOTES	38.13%	61.87%

DISTRICT #71	BATEMAN	JACKSON
CLERMONT **	31,066	14,127
TOTALS	31,066	14,127
PERCENTAGE OF VOTES	68.74%	31.26%

DISTRICT #72	DEAN	SNARR	VESPER
BROWN	1,668	6,719	6,009
CLERMONT **	3,019	4,312	6,666
CLINTON	743	7,017	6,906
TOTALS	5,430	18,048	19,581
PERCENTAGE OF VOTES	12.61%	41.91%	45.48%

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DISTRICT #73	FLACK	HARTLEY
CLARK **	17,083	26,307
TOTALS	17,083	26,307
PERCENTAGE OF VOTES	39.37%	60.63%

DISTRICT #74	HAINES	SHIRA
CLARK **	8,226	8,119
GREENE **	8,175	6,009
MADISON	7,727	4,913
TOTALS	24,128	19,041
PERCENTAGE OF VOTES	55.89%	44.11%

DISTRICT #75	JONES	MALLCHOK
PORTAGE **	29,564	15,202
TOTALS	29,564	15,202
PERCENTAGE OF VOTES	66.04%	33.96%

DISTRICT #76	REID	TATONE
GREENE **	33,438	8,813
TOTALS	33,438	8,813
PERCENTAGE OF VOTES	79.14%	20.86%

DISTRICT #77	GUTHRIE	MYERS
LICKING **	32,319	19,299
TOTALS	32,319	19,299
PERCENTAGE OF VOTES	62.61%	37.39%

DISTRICT #78	ABEL	SKINNER
ATHENS **	13,800	3,787
HOCKING	5,852	3,848
LICKING **	3,088	2,996
PERRY	6,098	6,438
TOTALS	28,838	17,069
PERCENTAGE OF VOTES	62.82%	37.18%

DISTRICT #79	JACKSON	SAWYER
RICHLAND **	15,339	30,640
TOTALS	15,339	30,640
PERCENTAGE OF VOTES	33.36%	66.64%

DISTRICT #80	LAWRENCE
DELAWARE	27,137
MORROW	8,896
RICHLAND **	5,199
TOTALS	41,232
PERCENTAGE OF VOTES	100.00%

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DISTRICT #81	BATCHELDER	FALLON
MEDINA **	31,602	17,564
TOTALS	31,602	17,564
PERCENTAGE OF VOTES	64.28%	35.72%

DISTRICT #82	GRIFFITH	HODGES
DEFIANCE	8,429	7,642
FULTON	5,889	11,846
WILLIAMS	6,710	9,296
TOTALS	21,028	28,784
PERCENTAGE OF VOTES	42.21%	57.79%

DISTRICT #83	WACHTMANN	WILLIAMS
HENRY	9,178	3,586
PAULDING	5,353	3,505
PUTNAM	11,823	4,236
VAN WERT	9,038	4,505
TOTALS	35,392	15,832
PERCENTAGE OF VOTES	69.09%	30.91%

DISTRICT #84	BUCHY	KOHLHORST
DARKE	18,869	4,430
MERCER	11,219	5,517
MIAMI **	6,334	2,628
TOTALS	36,422	12,575
PERCENTAGE OF VOTES	74.34%	25.66%

DISTRICT #85	DAVIS	HANNA
AUGLAIZE **	6,879	5,114
CHAMPAIGN	7,026	8,318
SHELBY	9,950	9,202
TOTALS	23,855	22,634
PERCENTAGE OF VOTES	51.31%	48.69%

DISTRICT #86	BRADING	RAMGE
AUGLAIZE **	5,877	1,991
HANCOCK	19,278	7,089
HARDIN	7,105	5,106
TOTALS	32,260	14,186
PERCENTAGE OF VOTES	69.46%	30.54%

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DISTRICT #87	CORE	SCHEIDERER
LOGAN	11,269	6,437
MARION **	8,038	6,695
UNION	8,705	4,908
TOTALS	28,012	18,040
PERCENTAGE OF VOTES	60.83%	39.17%

DISTRICT #88	RENO	WHITE
ADAMS	3,594	6,828
FAYETTE	3,297	6,101
HIGHLAND	5,200	9,485
PIKE	6,842	3,918
TOTALS	18,933	26,332
PERCENTAGE OF VOTES	41.83%	58.17%

DISTRICT #89	DAMSCHRODER	WISE JR
SANDUSKY	13,222	13,197
SENECA **	9,465	11,744
TOTALS	22,687	24,941
PERCENTAGE OF VOTES	47.63%	52.37%

DISTRICT #90	O'LEARY	WESTON
CRAWFORD	9,784	10,190
MARION **	3,302	8,262
SENECA **	1,519	2,765
WYANDOT	2,660	7,427
TOTALS	17,265	28,644
PERCENTAGE OF VOTES	37.61%	62.39%

DISTRICT #91	DETWILER	SHOEMAKER
PICKAWAY **	4,467	8,043
ROSS	6,408	18,812
VINTON	1,748	3,006
TOTALS	12,623	29,861
PERCENTAGE OF VOTES	29.71%	70.29%

DISTRICT #92	MINCH	RIFFE JR
LAWRENCE **	3,946	9,555
SCIOTO	7,949	24,559
TOTALS	11,895	34,114
PERCENTAGE OF VOTES	25.85%	74.15%

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DISTRICT #93	BYERS	WILLIAMS
ASHLAND	13,250	6,567
HURON **	2,325	1,789
KNOX	12,333	6,946
TOTALS	27,908	15,302
PERCENTAGE OF VOTES	64.59%	35.41%

DISTRICT #94	CREMEANS	MALONE
GALLIA	7,040	6,282
JACKSON	5,352	6,860
LAWRENCE **	5,538	6,502
MEIGS	4,959	4,905
TOTALS	22,889	24,549
PERCENTAGE OF VOTES	48.25%	51.75%

DISTRICT #95	HACKENBRACHT	MCCULLOUGH	PADGETT
COSHOCTON	808	5,743	9,024
HOLMES	307	2,201	5,227
MUSKINGUM **	723	6,533	11,229
TOTALS	1,838	14,477	25,480
PERCENTAGE OF VOTES	4.40%	34.64%	60.96%

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DISTRICT #96	JOHNSON	PHILLIPS
ATHENS **	2,449	3,652
MORGAN	4,190	2,105
MUSKINGUM **	7,655	6,317
WASHINGTON **	11,007	7,073
TOTALS	25,301	19,147
PERCENTAGE OF VOTES	56.92%	43.08%

DISTRICT #97	DIDONATO	WILSON
GUERNSEY	8,490	6,824
TUSCARAWAS **	25,917	6,192
TOTALS	34,407	13,016
PERCENTAGE OF VOTES	72.55%	27.45%

DISTRICT #98	KRUPINSKI	MOORES
HARRISON	5,460	2,056
JEFFERSON	28,553	8,347
TUSCARAWAS **	2, 901	1,036
TOTALS	36,914	11,439
PERCENTAGE OF VOTES	76.34%	23.66%

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DISTRICT #99	CERA	DEWEY
BELMONT	24,784	7,639
MONROE	6,029	1,130
NOBLE	3,496	1,845
WASHINGTON **	3,208	3,300
TOTALS	37,517	13,914
PERCENTAGE OF VOTES	72.95%	27.05%

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Appellees.

Appeal from the United States District Court for the Northern District of Ohio

APPELLEES' SUPPLEMENTAL BRIEF

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APPELLEES' SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 25.5, Appellees file this supplemental brief for the purpose of presenting to this Court results of the November 3, 1992 election, which were not available in time to have been included in Appellees' Brief. Specifically, this brief addresses the election results for Ohio's House of Representatives in the urban areas throughout the state. The November 3, 1992 election was conducted in accordance with the 1992 apportionment plan that the three-judge court found uncon-

stitutional and in violation of the Voting Rights Act, which is the subject of the appeal before this Court.

The 1992 election results show that Appellants aggregated black voters in districts already represented by minority legislators, where these voters had been able to elect candidates of their choice with white crossover voting. *See* Appellees' Brief, Chart C. For example, the district represented by minority legislator Mr. Sykes had a 1981 black population of 35.40 percent and he was re-elected in 1990 with 48.76 percent white crossover vote and 65.49 percent of the vote overall. *See* Charts C and D.[1] Appellants increased the black population in the district Mr. Sykes represents. *See* Chart D. Under the 1981 apportionment, the coalition of black and white voters in the urban districts elected eleven minority representatives with overwhelming pluralities. *Id.* Each of the eleven black legislators won with more than 63 percent of the average vote in elections held from 1984 through 1988 and in the 1990 election. J.A. 308. Seven of these eleven districts had a 1981 black population below 50 percent. *See* Chart D. Yet, in the 1991 apportionment plan the black population was increased in eight of the eleven districts represented by these legislators, six of whom won their districts by nearly a three-to-one margin or more[2] and won with an average of 78.47 percent of the vote in the 1992 election.

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[1] Mr. Sykes was first elected to that district in 1984, replacing a white incumbent, Mr. Crossland. J.A. 185. However, in 1984 Mr. Sykes won by a greater margin than his white predecessor, despite the fact that he had the lowest black population percentage (35.2) of the eleven districts represented by minorities. J.A. 200. Similarly, minority representative, Mr. Roberts, had no difficulty getting elected for the first time in 1986, replacing Mr. Orlett, a white representative, with as little as 36 percent black population. J.A. 186, 200. Chart D is included in the attached Appendix.

[2] In 1992, Casey Jones won District 49 in Lucas County by a margin of five-to-one. Representative Beatty, who represents one of the eight districts where the population was increased, ran unopposed.

Id. Moreover, seven of the twelve legislators elected in 1992 ran against white candidates. *Id.*[3]

Appellants claimed that they needed to increase black population percentages because the districts were represented by incumbents, arguing that a new candidate would be unable to win the election absent a guaranteed safe seat.[4] However, Ms. Boyd, who is black, was a new candidate in the 1992 election and won the seat for the ninth district in Cuyahoga County with a plurality of 83.46 percent. *See* Chart D. The black population of the ninth district was increased to 62.30 percent. *Id.* In fact, District 9, which was established for a non-incumbent, has 5.05 percent less black population than District 10, the most black populous district in Cuyahoga County. Yet, Ms. Boyd, the non-incumbent, won with a plurality of only 3.28 percent less than Mr. James, the fourteenth term incumbent from District 10. *Id.*

Another effect of aggregating blacks into districts that guarantee a black candidate a safe seat is that certain groups of blacks who were in districts where they were able to elect a candidate of choice were gerrymandered into a district where in the 1992 election, they were unable to elect their candidate of choice.

For example, the city of Lincoln Heights, Hamilton County, was located in District 24, with a black population of 32.3 percent, under the 1981 apportionment. J.A.

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[3] In the 1992 election, white incumbent candidate, Jane Campbell, defeated a black Republican candidate in the 11th District, Cuyahoga County, which has a black population of 43.01 percent, and white population of 56.99 percent. Ms. Campbell won the election with 81.09 percent of the vote. Thus, assuming that all of the white population voted for her, she still received a majority of the black population's vote in her district, especially since her opponent only received 18.91 percent of the vote.

[4] The statistics from prior elections do not support this argument. *Id.*

306.[5] Democrat legislator Terry Tranter represented House District 24 and had a 90 percent voting record on issues of concern to the minority community. D. 112, Ex. 17. Under Amendment D to the 1991 plan, Lincoln Heights, which has a black population of 99 percent, was moved to House District 36 which has a black population of 4.49 percent. D. 147, Ex. C at 77; J.A. 306. In the 1992 election, Lincoln Heights voters cast 1,132 votes for Democrat candidate Mr. Stidham and only 176 votes for Republican candidate Mr. Schuler.[6] Likewise, the city of Silverton, Hamilton County, has 47.4 percent black population and under the 1981 plan was located in House District 25 which had a black population of 53.2 percent. J.A. 306. Minority legislator Helen Rankin represented House District 25 throughout the 1980s. J.A. 308. Under Amendment D, Silverton was also moved to House District 36. D. 147, Ex. C at 77. In the 1992 election, Silverton cast 1,511 votes for Mr. Stidham and 990 for Mr. Schuler. Mr. Schuler won the election with 69.85 percent of the vote.

In Franklin County at least five precincts/wards (23F, 24E, 42B, 42G, and 27E), which in the 1981 plan were located in House District 29 with a black population of 38.5 percent (J.A. 306), were moved to districts with minimal black population. Minority legislator Ray Miller represented House District 29 throughout the 1980s. J.A. 308. Precinct 23, ward F has a black population of 36 percent; precinct 42, ward B has 44 percent; and precinct 42 ward G has 34 percent black population. Under

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[5] Data relating to the 1981 districts, and population figures for cities, princincts/wards taken from the 1990 census, are contained in the CSU database that was stipulated into evidence. D. 131 at 1.

[6] Election statistics were taken from the General Election results obtained from the various County Boards of Elections and the Unofficial Report of Votes for Ohio House of Representatives compiled by Secretary of State Bob Taft.

Amendment D precincts/wards 23F, and 42B & G were apportioned to House District 26 with a black population of 8.66 percent. J.A. 306. These precincts/wards collectively cast 419 votes for Democrat candidate Mr. Ryan and 302 votes for Republican candidate Mr. Tiberi. Mr. Tiberi won with 67.75 percent of the vote.

Under Amendment D, precinct 24, ward E in Franklin County, which has 48 percent black population, was apportioned to House District 27, with a black population of 3.57 percent. D. 147, Ex. C at 77; J.A. 306. This precinct/ward cast 154 votes for Democrat candidate Mr. Briggs and 55 votes for Republican candidate Mr. Thomas. In a three-way race, Mr. Thomas won with 51.83 percent of the vote. Under Amendment D, precinct 27, ward E, which has a black population of 35 percent was apportioned to House District 25 with a black population of 8.41 percent. This precinct/ward cast 127 votes for Democrat candidate Mr. Schultz and 52 for Republican candidate Mr. Mason. Mr. Mason won the election with 53.14 percent of the vote.

In Cuyahoga County, the Village of Oakwood, precinct A, ward 5, under the 1981 apportionment, was located in House District 17, which had a black population of 26.14 percent. J.A. 305. Democrat Frank Mahnic represented House District 17 and had a 90 percent voting record on issues important to the minority community. D. 112, Ex. 17. Under Amendment D, the Village of Oakwood, which has a black population of 67 percent, was moved to House District 15 with a total black population of 3.29 percent. D. 147, Ex. C at 77; J.A. 305. In the 1992 election, the Village of Oakwood cast 173 votes for Democrat candidate Frank Mahnic and only 36 votes for Republican candidate Mr. Wise. Mr. Wise won the election with 56.22 percent of the vote.

Respectfully submitted,

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APPENDIX

CHART D

MINORITY REPRESENTATIVES

1991 H.D. #	Black Rep.	1981 Black Pop. %	1990 Winning Candidate % of Vote	1991 Black Pop. %[1]	1992 Winning Candidate % of Vote[2]
8	Prentiss	74.80	88.61	65.64	86.78
9	Boyd *	34.80	N/A	62.30	83.46
10	James	94.67	86.69	67.35	86.74
12	Whalen	90.05	92.82	67.25	85.61
21	Beatty	46.80	71.55	54.30	100.00[3]
22	Miller *	38.50	67.91	44.68	75.05
30	Rankin *	53.20	73.37	55.98	79.26
31	Mallory *	45.90	70.47	49.16	68.44
38	McLin *	42.10	64.88	43.50	74.48
39	Roberts	36.10	64.48	41.69	73.74
44	Sykes *	35.40	65.49	43.07	73.58
49	Jones *	41.70	67.12	49.90	83.17

* Ran against a white candidate.

[1] Figures relate to Appellants' Amendment D to the apportionment plan. J.A. 305-08.

[2] Figures were taken from the Unofficial Report of Votes for Ohio House of Representatives Compiled by Secretary of State Bob Taft.

[3] Unopposed.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS

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QUESTIONS PRESENTED

1. Whether the district court erred in holding that the State of Ohio violated Section 2 of the Voting Rights Act, 42 U.S.C. 1973, by adopting a legislative redistricting plan that created majority-minority electoral districts despite the absence of proof that creation of such districts was required in order to remedy a violation of the Voting Rights Act.

2. Whether the district court erred in holding that the State of Ohio's legislative redistricting plan intentionally fragmented minority voting concentrations in violation of the Fifteenth Amendment.

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INTEREST OF THE UNITED STATES

This case involves claims that the State of Ohio's legislative reapportionment plan violates Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. The United States has the primary responsibility for enforcing Section 2. Moreover, in exercising his preclearance authority under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, the Attorney General considers whether a proposed change in election laws violates the requirements of the Fifteenth Amendment. 28 C.F.R. 51.55(a). Thus, the decision of the Court in this case

will have an important effect on federal enforcement efforts. In addition, the United States has participated either as a party or as an amicus curiae in many of the Court's previous voting rights cases, and it has also responded to requests from the Court concerning whether certiorari should be granted in such cases. See, *e.g.*, *Growe* v. *Emison*, probable jurisdiction noted, No. 91-1420 (Mar. 30, 1992); *Richards* v. *Terrazas*, 112 S. Ct. 1556, 112 S. Ct. 2272 (1992); *Houston Lawyers' Ass'n* v. *Attorney General*, 111 S. Ct. 2376 (1991); *Sanchez* v. *Bond*, 493 U.S. 916 (1989), 111 S. Ct. 310 (1990); *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).

STATEMENT

1. The General Assembly of the State of Ohio consists of a House of Representatives and a Senate. Ohio Const., art. II, § 1. The House of Representatives has 99 members elected from single-member electoral districts. Ohio Const., art. XI, § 1. The Ohio Constitution requires the State's apportionment board to reapportion the electoral districts for the state House of Representatives every ten years. *Ibid.*

In August 1991, the state apportionment board convened to conduct the decennial reapportionment of the General Assembly pursuant to the state constitutional mandate. The board consisted of Governor George Voinovich, state Auditor Thomas Ferguson, Secretary of State Robert Taft, state Senator Stanley Aronoff, and state Representative Barney Quilter. J.S. App. 1a-2a, 50a. James Tilling, the chief executive of the Ohio Senate, was selected by the majority of the apportionment board to draft a new apportionment plan. *Id.* at 52a. Tilling held 14 public hearings around Ohio in the summer of 1991 to receive public

comment on the reapportionment process. *Id.* at 6a. At many of those hearings, Tilling told the audiences that he understood the Voting Rights Act to require the State to consider "the totality of the circumstances in each urban area" and to create, where possible, legislative districts in which minority voters constituted a voting majority. *Ibid.* Members of minority groups spoke at many of the hearings. *Ibid.*

After the hearings were concluded, Tilling drafted his proposed reapportionment plan, which he submitted to the apportionment board on September 26, 1991. The board adopted Tilling's plan, with minor amendments, on October 3, 1991, by a three-to-two party-line vote. J.S. App. 6a, 50a. That plan (the "1991 plan") created eight House of Representatives electoral districts in which blacks constituted a majority of the voting age population (VAP), with black VAP ranging from 50.30 percent to 65.13 percent. *Id.* at 114a, 183a-185a. Blacks constituted at least ten percent of the VAP in a total of 20 districts under the 1991 plan. *Ibid.* The plan proposed by appellees Quilter and Ferguson, which was rejected by the board, would have created six majority-black districts (with black VAP ranging from 50.60 percent to 67.08 percent) and a total of 20 districts in which blacks constituted at least ten percent of the VAP. *Id.* at 114a, 183a-185a. The preexisting 1981 apportionment plan had created only four majority-black districts, and a total of 26 districts in which blacks constituted at least ten percent of the VAP. *Id.* at 96a-98a, 177a-178a.[1]

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[1] Six counties in Ohio—Cuyahoga, Franklin, Hamilton, Montgomery, Summit, and Lucas—have significant minority populations; all of the State's majority-black districts are located in those counties. Under the 1981 reapportionment

On November 1, 1991, appellees filed a class action in the United States District Court for the Northern District of Ohio alleging that the 1991 plan unnecessarily packed black voters into electoral districts and fragmented other concentrations of black voters in violation of Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the Fifteenth Amendment to the United States Constitution. Appellees also alleged that the 1991 plan amounted to unconstitutional political gerrymandering in violation of the Equal Protection Clause of the Fourteenth Amendment.[2] Appellees requested an order enjoining implementation of the 1991 plan. Compl. at 9-23, in *Quilter* v. *Voinovich*, No. 91CV-2219.

2. On January 31, 1992, the three-judge district court ordered the apportionment board to reconsider the 1991 plan. J.S. App. 1a-16a. The court first rejected the notion that Section 2 of the Voting Rights Act mandates the drawing of majority-minority districts, observing that nothing in the language of the statute creates such a requirement. J.S. App. 8a-10a. Moreover, the court held that the first precondition to vote-dilution claims set forth in *Thornburg* v.

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plan, those six counties were divided into 43 electoral districts. Eleven black representatives (over 25 percent of the total delegation from those counties) were elected from those 43 districts in the 1990 election. J.S. App. 22a-23a, 58a-62a. Blacks make up about 20 percent of the population of the six counties. J.S. App. 23a. Based on 1981 figures, the districts that elected black representatives had black populations ranging from 35.4 percent to 94.6 percent. J.S. App. 115a.

[2] Appellees also claimed that the 1991 plan violated the Ohio Constitution. In *Voinovich* v *Ferguson*, 586 N.E.2d 1020 (1992), however, the Ohio Supreme Court ruled that the 1991 plan, with minor technical corrections, complied with applicable state law.

Gingles, 478 U.S. 30 (1986)—namely, the requirement that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50—was "not applicable to the apportionment of single-member districts and claims of dilution of minority influence districts at issue here." J.S. App. 10a.

The court further held that the apportionment board's "wholesale creation of majority-minority districts" could not be justified under the Voting Rights Act unless the board had first properly demonstrated the existence of a violation of that Act. J.S. App. 14a. The court found that Tilling and the board had failed to demonstrate the existence of such a violation, because "[t]he finding of a violation requires an in-depth analysis of the totality of the circumstances in the locality at issue" (*id.* at 11a), and no such analysis had been conducted. In particular, Tilling's conclusion that significant racial bloc voting existed in Ohio was not properly supported by written findings and regression analysis (*id.* at 12a-13a), and thus "d[id] not rise to the level of proof of racially polarized voting." *Id.* at 13a.

Likewise, Tilling's conclusions concerning social and historical factors and the unresponsiveness of elected officials to the concerns of the minority community were not probative, according to the district court, because Tilling had failed to conduct the requisite " 'searching practical evaluation of past and present reality' mandated by the legislative history" of the Voting Rights Act. J.S. App. 13a-14a. Accordingly, the district court ordered the board to conduct such an examination of the "totality of the circumstances" in order to justify its otherwise invalid decision to create majority-minority districts.

Id. at 14a. In the alternative, the board was instructed to submit a revised plan to the court for its approval. *Id.* at 14a-15a.

Judge Dowd dissented. J.S. App. 17a-117a. He criticized the majority for failing to provide "detailed findings of facts" (*id.* at 20a), and set forth an exhaustive listing of the facts relevant to a proper disposition of the case. *Id.* at 21a-29a, 40a-117a. Moreover, he found the majority's legal analysis to be flawed. *Id.* at 31a-35a. He rejected the majority's conclusion that the State was required to prove a Voting Rights Act violation before it could create a majority-black district, noting that "[t]his argument places the cart before the horse." *Id.* at 31a. Instead, Judge Dowd argued that "[i]t is only when the creation of majority-minority districts serves to dilute the minority vote that the Voting Rights Act is violated," and concluded that the record in this case did not support such a claim. *Id.* at 32a.

In addition, he observed that the majority's refusal to permit the State to increase the black population in any district which had already elected a black representative effectively required, contrary to the Voting Rights Act, that the minority's voting strength be maximized. J.S. App. 35a. Finally, he noted that "it is difficult to find that there has been impermissible minority vote dilution in Ohio" given the fact that "blacks have been able to consistently elect more representatives in the six major urban counties than their percentage of the population would suggest." *Ibid.*

Judge Dowd also found that no Fifteenth Amendment violation had been shown, because appellees had failed to prove that the board harbored any discriminatory intent in creating the 1991 plan (J.S. App. 36a-37a); instead, the board considered race solely

for the purpose of avoiding any violation of the Voting Rights Act, and if anything its "consideration of race served to enhance the black vote." *Id.* at 37a.

3. The apportionment board responded to the district court's order by submitting information intended to show that the "totality of the circumstances" in Ohio closely approximated the evidence needed to prove a Section 2 case. The board also revised the 1991 plan, adopting "Amendment D" in order to correct "technical" errors that had been identified by the Ohio Supreme Court in its independent review of the plan. J.S. App. 258a-259a; J.A. 334, 337. The revised plan (the "1992 plan") created five majority-black districts. J.S. App. 258a-263a.[3]

4. On March 10, 1992, the district court invalidated the corrected 1992 plan. J.S. App. 118a-121a. The court found that the board had failed to proffer sufficient evidence to prove a violation of the Voting Rights Act so as to justify the board's creation of majority-black districts. *Id.* at 119a. According to the court, "the Board fail[ed] once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." *Ibid.* In addition, the court held that the 1992 plan was invalid under the Fifteenth Amendment. *Ibid.* Accordingly, the court enjoined enforcement of the 1992 plan and appointed a special master to prepare an "acceptable" apportionment plan. *Id.* at 119a-120a.

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[3] The 1992 plan also created a total of 13 districts with a black VAP of at least 35 percent. J.S. App. 260a-263a. The 1991 plan and the plan originally proposed by the board minority each would have created 12 such districts (*ibid.*), and the 1981 plan had provided for nine such districts. *Id.* at 96a-98a. According to the district court, "black candidates have been repeatedly elected from districts with only a 35% black population." *Id.* at 141a.

Judge Dowd again dissented. J.S. App. 122a-126a. Judge Dowd found that the apportionment board had submitted "an exhaustive set of fact findings" that sufficed to justify its creation of majority-minority districts. *Id.* at 122a.

On March 19, 1992, the district court majority issued a further order (J.S. App. 127a-148a) to "more fully develop" the majority's earlier findings and conclusions. *Id.* at 128a. The court observed that "[b]oth *Gingles* and the Senate Report [accompanying the 1982 amendment to Section 2] state that violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action." *Id.* at 129a. Accordingly, the court reaffirmed its previous holding that the apportionment board was required to demonstrate the existence of a Voting Rights Act violation before it could be permitted to create majority-minority districts. *Id.* at 128a-140a.

The court again found that the board had failed to establish the prerequisites to a Section 2 violation. In particular, the court found that "legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice." J.S. App. 132a.[4] Indeed, the court accused the board of "ignor[ing] three critical facts: the absence of racial bloc voting, the fact that black voters have been able to elect both black and white candidates of their choice, and the fact that such

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[4] The only exception to this finding involved two districts in Mahoning County, which the court in *Armour* v. *Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), had previously found violative of Section 2 and the Fifteenth Amendment. J.S. App. 132a. Those districts were redistricted in accordance with the *Armour* court's ruling (*id.* at 183a), and were not challenged by appellees in this case.

candidates have been elected over a sustained period of time." *Id.* at 130a; see also *id.* at 139a-140a.

The court then rejected appellants' argument that the court's own finding of a Section 2 violation was flawed by its failure to evaluate the totality of the circumstances. J.S. App. 141a-142a. Noting that "[t]he totality of circumstances reveals coalitional voting between whites and blacks," and that "black candidates have been repeatedly elected from districts with only a 35% black population," the court found that the apportionment board's "per se requirement of the creation of majority-minority districts has a dilutive effect on black votes—exactly what [appellants] intended." *Id.* at 141a-142a. The court further held that the board had violated the Fifteenth Amendment by intentionally creating majority-minority districts for "political advantage," asserting that "[i]t is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim." *Id.* at 142a-143a.

On March 31, 1992, the district court ordered that the primary elections for the Ohio General Assembly be rescheduled to September 8, 1992. J.S. App. 324a. On April 20, 1992, this Court stayed the district court's orders of March 10, March 17, and March 31, 1992. *Voinovich* v. *Quilter*, 112 S. Ct. 1663.

SUMMARY OF ARGUMENT

I. The district court erred in suggesting that Section 2 of the Voting Rights Act automatically forbids the States to create majority-minority electoral districts in the absence of a proven violation of the Act. Within the confines of federal law, the States are free to select whatever redistricting criteria they wish. To be sure, the creation of majority-minority districts

could under some circumstances result in vote dilution in violation of Section 2, but such a violation must be proved under the same standards applicable to all vote-dilution claims under Section 2.

In our view, the three threshold preconditions set forth in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), apply to claims that single-member districts have been drawn in a manner that dilutes the voting power of a particular minority group. Under *Gingles*, a plaintiff group must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 48-51.

Considered in light of the *Gingles* preconditions, the district court's factual findings compel rejection of the Section 2 vote-dilution claim in this case. The district court expressly found that racially polarized voting is not present in Ohio, because whites do not vote sufficiently as a group so as to prevent black voters from electing representatives of their choice. In light of that finding, appellees cannot satisfy the third *Gingles* precondition, and thus their Section 2 claim must be rejected. Moreover, the district court's finding of a Section 2 violation also fails under the first *Gingles* precondition, because the court erroneously assumed that Section 2 requires the creation of districts in which the minority group is demonstrably not a majority of the voting age population.

II. Claims under the Fifteenth Amendment require proof of discriminatory motivation. *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980). The district court purported to find that appellants violated the Fifteenth Amendment in this case, but that finding cannot with-

stand scrutiny. The court justified its finding of discriminatory intent on the ground that appellants allegedly acted "for political advantage," J.S. App. 142a-143a, but evidence of *political* gerrymandering does not suffice to justify a finding of *racial* gerrymandering.

" 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *City of Mobile* v. *Bolden*, 446 U.S. 55, 72 n.17 (1980) (plurality opinion) (quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979)). In this case, the district court failed to identify any evidence supporting a finding of discriminatory purpose under that standard. Indeed, the court did not dispute the truthfulness of appellants' assertions that they understood the Voting Rights Act to require the creation of majority-minority districts. Under these circumstances, the district court's finding of discriminatory intent should be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD'S CREATION OF MAJORITY-BLACK DISTRICTS RESULTED IN DILUTION OF BLACK VOTES IN VIOLATION OF SECTION 2 OF THE VOTING RIGHTS ACT.

1. The district court clearly erred in suggesting that Section 2 of the Voting Rights Act automatically forbids creation of majority-minority districts in the absence of the equivalent of a judicial finding of a Section 2 violation. Nothing in the language of Section 2 or in the cases construing that provision supports such an interpretation, and the district court's holding to the contrary is simply without foundation.

The district court reasoned that the Voting Rights Act does not itself mandate the creation of majority-minority districts in the absence of a finding of a legal violation; as the court pointed out, "violations of the Voting Rights Act must be proven, not assumed, as a predicate for remedial action." J.S. App. 129a. That statement of the law is correct as far as it goes: Nothing in the Voting Rights Act requires state or local jurisdictions to maximize the number of majority-minority districts, or authorizes courts to require creation of such districts in the absence of a judicial finding of a legal violation.

But the fact that creation of majority-minority districts is not required by the Voting Rights Act provides no support for the conclusion that the Act *forbids* the States to achieve that goal. States do not derive their reapportionment authority from the Voting Rights Act, but rather from independent provisions of state and federal law, and nothing in the Act takes from the States their preexisting authority

to choose the particular policies and goals they wish to be reflected in their reapportionment plans. As long as those policies and goals do not conflict with the commands of federal law, the States are free to reapportion in whatever manner they see fit.

Similarly, the fact that *courts* may not require creation of majority-minority districts until a violation has been proven does not suggest that the *States* are subject to the same limitation under Section 2. The States have both the right and the responsibility to reapportion their own legislative districts in the first instance, and in doing so may well choose to implement policies that would be beyond the authority of the federal courts to achieve. See *Wise* v. *Lipscomb*, 437 U.S. 535, 539-541 (1978) (opinion of White, J.); *Connor* v. *Finch*, 431 U.S. 407, 414-415, 419-420 (1977). Absent a showing of an underlying legal violation, Section 2 grants the federal courts no authority to interfere with a State's reapportionment process or to require state officials to justify the goals they have chosen to achieve as part of that process.[5]

It is no doubt true that a State's creation of majority-minority districts could under some circumstances result in unlawful vote dilution in violation of Section 2, and in those circumstances a federal court would be both authorized and obligated to invalidate some or all of the apportionment scheme. But Section 2 provides no basis for invalidating a state redistricting plan merely because the State has chosen to create majority-minority districts; the invalidity of the plan under Section 2 must still be

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[5] Of course, under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, covered jurisdictions must obtain administrative or judicial preclearance for changes in their election laws. The State of Ohio is not subject to the requirements of Section 5.

proven under the same standards applicable to all vote-dilution claims.

2. The district court's findings effectively rebutted the State's assertion that creation of majority-black districts was required to remedy an existing Section 2 violation. Those same findings, however, foreclosed the court's holding that the 1992 plan resulted in dilution of black votes in violation of Section 2. The district court's finding of a Section 2 violation cannot be sustained.

a. In *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), this Court established three threshold requirements applicable to a claim that the use of multimember districts has diluted the votes of minority group members in violation of Section 2. As a prerequisite to the maintenance of such a claim, a minority group must show that (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "it is politically cohesive"; and (3) "the white majority votes sufficiently as a block to enable it * * * usually to defeat the minority's preferred candidate." 478 U.S. at 48-51.

Although *Gingles* involved a challenge to multimember districts, in our view the same preconditions apply to claims that the drawing of single-member districts results in dilution of minority votes.[6] Thus, plaintiffs who seek to invalidate a redistricting plan on the ground that it dilutes minority voting power in violation of Section 2 (either by "packing" minority voters into a few districts or by "fragmenting" geographically cohesive minorities among numerous districts) must prove, as part of their prima facie case,

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[6] Our position in this regard is set forth in our brief *amicus curiae*, at 8-12, in *Growe* v. *Emison*, No. 91-1420. Copies of that brief have been provided to the parties in this case.

that the allegedly injured group could constitute a majority of the voting age population in a single-member district and that the relevant jurisdiction exhibits legally significant racially polarized voting. Appellees cannot meet that burden in this case.[7]

b. The district court repeatedly found that racial bloc voting is not present in Ohio.[8] J.S. App. 130a, 132a, 139a-140a. Given that "legally significant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice" (*id.* at 132a), appellees simply cannot succeed on their claim that the 1992 plan results in dilution of black voting power in violation of Section 2, because such racial bloc voting is a prerequisite to a vote-dilution claim. See *Sanchez* v. *Bond*, 875 F.2d 1488, 1494-1496 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990); *Overton* v. *City of Austin*, 871 F.2d 529, 540 (5th Cir. 1989); see also *Thornburg* v. *Gingles*, 478 U.S. at 46 ("the results test does not assume the existence of racial bloc voting; plaintiffs must prove it"). Here, as in *Gingles*, "in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Id.* at 49 n.15.

Moreover, the district court's finding of a Section 2 violation also failed to comply with the first *Gingles* precondition: The requirement that the allegedly in-

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[7] Accordingly, this case does not present the question of what, if any, additional facts must be proven in order to establish a prima facie case of vote dilution in cases challenging the drawing of single-member districts.

[8] As noted above, note 4, *supra*, the district court exempted from this finding the two districts at issue in *Armour* v. *Ohio*. J.S. App. 132a.

jured group "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S. at 50. Indeed, the legal theory accepted by the district court is directly at odds with the first *Gingles* precondition, because it assumes that Section 2 requires creation of districts in which minorities are demonstrably *not* a majority of the voting age population. See J.S. App. 141a. We agree with those courts that have rejected such a notion.[9] Because the district court's findings establish that the *Gingles* preconditions are not present in this case, the court's holding that the 1992 plan results in minority vote dilution in violation of Section 2 must be reversed.

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[9] See, *e.g.*, *McNeil* v. *Springfield Park Dist.*, 851 F.2d 937, 942, 947 (7th Cir. 1988), cert. denied, 490 U.S. 1031 (1989); *Latino Political Action Comm., Inc.* v. *City of Boston*, 784 F.2d 409, 412, 415 (1st Cir. 1986); *Skorepa* v. *City of Chula Vista*, 723 F. Supp. 1384, 1391-1392 (S.D. Cal. 1989); *Turner* v. *Arkansas*, 784 F. Supp. 553, 567-571 (E.D. Ark. 1991), aff'd, 112 S. Ct. 2296 (1992); *Hastert* v. *State Bd. of Elections*, 777 F. Supp. 634, 651-655 (N.D. Ill. 1991); see also *Brewer* v. *Ham*, 876 F.2d 448, 451 (5th Cir. 1989); *Ewing* v. *Monroe County*, 740 F. Supp. 417, 419 (N.D. Miss. 1990); *Jeffers* v. *Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989); *Gunn* v. *Chickasaw County*, 705 F. Supp. 315, 318 (N.D. Miss. 1989); *McDaniels* v. *Mehfoud*, 702 F. Supp. 588, 592 (E.D. Va. 1988); *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1434-1435 (E.D. Va. 1988); *Gingles* v. *Edmisten*, 590 F. Supp. 345, 380-381 (E.D.N.C. 1984), aff'd in part and rev'd in part, *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). This Court's summary affirmance of *Turner* v. *Arkansas*, *supra*, provides further support for the rejection of the district court's holding in this case. The appellants in *Turner* sought review in this Court on the question whether so-called "influence" claims are cognizable under Section 2, and the Court summarily affirmed the district court's rejection of such claims. See Jurisdictional Statement at i, 1-2, in *Turner* v. *Arkansas*, No. 91-1615.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD'S CREATION OF MAJORITY-BLACK DISTRICTS VIOLATED THE FIFTEENTH AMENDMENT.

In its March 19, 1992, opinion, the court found that the apportionment board's redistricting plan was the product of "intentional dilution for political reasons," and was accordingly invalid under the Fifteenth Amendment. J.S. App. 143a. That finding was erroneous.[10]

"[R]acially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation."

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[10] In *City of Mobile* v. *Bolden*, 446 U.S. 55, 65 (1980), the plurality suggested that no Fifteenth Amendment violation can be shown where the plaintiff group has been permitted to "register and vote without hindrance." Three justices disagreed with the plurality on that point, and two expressed no opinion on the subject, thus leaving the question open for future resolution. See *Rogers* v. *Lodge*, 458 U.S. 613, 619 n.6 (1982); see also *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976) ("There is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment."). The lower courts are divided over the applicability of the Fifteenth Amendment to vote-dilution claims. Compare, *e.g.*, *Buchanan* v. *City of Jackson*, 708 F.2d 1066, 1069 (6th Cir. 1983); *McMillan* v. *Escambia County*, 638 F.2d 1239, 1243 n.9 (5th Cir.), cert. dismissed, 453 U.S. 946 (1981), vacated in part, 688 F.2d 960, 961 & n.2 (5th Cir. 1982); with, *e.g.*, *United States* v. *Marengo County Comm'n*, 731 F.2d 1546, 1555 (11th Cir.), appeal dismissed, 469 U.S. 976 (1984); *Perkins* v. *City of West Helena*, 675 F.2d 201, 205-206 & n.6 (8th Cir.), aff'd, 459 U.S. 801 (1982); *Washington* v. *Finlay*, 664 F.2d 913, 919 & n.3 (4th Cir. 1981); *Lodge* v. *Buxton*, 639 F.2d 1358, 1372-1373 (5th Cir. 1981). Because the district court erred in finding the requisite discriminatory intent in this case, and because neither the court nor the parties addressed the scope of the Fifteenth Amendment below, there is no need for the Court to resolve the question at this time.

City of Mobile v. *Bolden*, 446 U.S. 55, 62 (1980) (plurality opinion of Stewart, J.); see *id.* at 103 (White, J., dissenting). The district court failed to identify any legally sufficient basis for concluding that appellants adopted the 1992 plan for the purpose of discriminating against blacks. Thus, assuming the Fifteenth Amendment is applicable to vote-dilution claims, the district court's holding that appellants violated that provision cannot be sustained.[11]

The district court purported to find that the apportionment board's alleged fragmentation of minority areas was an act of intentional racial discrimination. The only explanation of the factual basis for that finding, however, came in the district court's March 19, 1992, order, in which the court explained that "the board cannot seriously contend that it did not apply its 'remedy' intentionally and for political advantage in violation of the Fifteenth Amendment. These facts clearly establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination." J.S. App. 142a-143a.

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[11] For the same reason, the district court's findings would not support invalidation of the 1992 plan on the ground that it constituted intentional discrimination against black voters in violation of Section 2 of the Voting Rights Act or the Equal Protection Clause of the Fourteenth Amendment. Cf. *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990) (holding that, in a Section 2 case, the requirement that the minority group be sufficiently numerous and compact to constitute a majority of a single-member district may be relaxed where intentional racial discrimination has been shown), cert. denied, 111 S. Ct. 681 (1991). The district court did not rely on the Equal Protection Clause in invalidating the 1992 plan as racially discriminatory, presumably because appellees failed to assert such a claim under the Fourteenth Amendment in their complaint.

In our view, that statement is not sufficient to sustain appellees' claim that concentrations of minority voters were intentionally and discriminatorily divided in order to reduce their political clout. The court appears to have held that the board's decision to create majority-minority districts was intended to further political interests, and proceeded from that finding to the conclusion that appellants acted with racially discriminatory intent in so doing. But evidence of attempted political gerrymandering does not suffice to make out a claim of *racial* gerrymandering; it need hardly be said that racial gerrymandering requires specific intent to discriminate against a particular *racial* group.

To make out a racial vote-dilution claim, plaintiffs must show that the challenged districting scheme was in fact intended to harm voters of a particular racial or ethnic group, and was intended to do so because they are members of that group. Thus, here the court would have to have found that the 1992 plan's district lines were chosen *because* they would have a fragmenting effect on black voters. " 'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *City of Mobile* v. *Bolden*, 446 U.S. 55, 72 n.17 (1980) (plurality opinion) (quoting *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979)).

Absent from the district court's decisions is any mention of evidence tending to show that the 1992 plan was devised for the purpose of dividing black voting areas, or that the apportionment board's intention was to reduce the political clout of the people in

those areas because they were black. To the contrary, the only evidence discussed by the district court concerning the apportionment board's intentions toward black voters indicates that the board majority and Tilling sought to *avoid* diluting black voting power by creating majority-black districts, and that they did so because they believed the Voting Rights Act required that result. J.S. App. 6a-14a, 130a, 134a & n.4, 142a; see also J.A. 21-22, 80, 82-83, 232-233, 272, 279-285. Indeed, while the district court emphatically rejected the suggestion that the Voting Rights Act required the apportionment board to create majority-black districts, the court did not dispute that appellants acted in the good-faith, though mistaken, belief that their actions were required by federal law.[12] Accordingly, the district court's finding of discriminatory intent is unsubstantiated, and should be reversed.

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[12] The district court's finding of discriminatory intent is further undercut by the fact that the board's reapportionment plan was devised only after extensive consultation with representatives of the NAACP and the Black Elected Democrats of Ohio (BEDO), and in fact incorporated extensive suggestions made by those and other minority organizations. J.S. App. 71a-77a, 80a-81a, 164a-167a, 269a-270a. BEDO endorsed portions of the plan, and the NAACP endorsed the plan as a whole. *Ibid.*; *id.* at 117a.

CONCLUSION

The district court's findings that appellants violated Section 2 and the Fifteenth Amendment should be reversed.

Respectfully submitted.

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No. 91-1618

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GEORGE V. VOINOVICH, *et al.*,

Appellants,

V.

BARNEY QUILTER, *et al.*

Appellees

On Appeal from the United States District Court for the Northern District of Ohio

BRIEF AMICI CURIAE IN SUPPORT OF APPELLEES OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, THE NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC.

INTEREST OF AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("the Fund") is a non-profit corporation that was

* Letters consenting to the filing of this brief have been filed with the Clerk of Court.

established for the purpose of assisting black citizens in securing the constitutional and civil rights. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant constitutional and statutory voting rights cases in this Court. *See, e.g., Houston Lawyers Ass'n v. Attorney General of Texas*, 111 S.Ct. 2376 (1991); *Chisom v. Roemer*, 111 S.Ct. 2354 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Hispanic voters in numerous voting rights cases, has frequently appeared before this Court in such cases, *see, e.g., City of Lockhart v. United States*, 460 U.S. 125 (1983), has challenged the redistricting of the most populous local jurisdiction in the country, *see Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal.), *aff'd*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. ___, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991), and has been intensely involved in redistricting advocacy following the 1990 census, *see, e.g., Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991)(three-judge court); *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992).

The National Asian Pacific American Legal Consortium ("NALPAC") is a nonprofit organization whose mission is to advance the legal and civil rights of

Asian Pacific Americans through a national collaborative structure that pursues litigation, advocacy, education, and public policy development. The NALPAC is composed of three civil rights organizations that have advocated for the voting rights of Asian Pacific Americans: the Asian American Legal Defense and Education Fund (New York)s, the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific America Legal Center of Southern California (Los Angeles). All three members of the NALPAC have promoted the political empowerment of Asian Pacific Americans through litigation, legislative advocacy, and participation in state and local redistricting efforts.

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Protection of the voting rights of citizens is an important part of the Committee's work. The Lawyers' Committee has represented black citizens in reapportionment before this Court in several cases including *Connor v. Finch*, 431 U.S. 407 (1977), and *Smith v. Clinton*, 488 U.S. 988 (1988), and has appeared in numerous other significant voting rights cases in this Court. *See, e.g., Clark v. Roemer*, 111 S.Ct. 2096 (1991).

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national civil rights organization founded in 1972 to protect the civil rights of Puerto Ricans and other Latinos, and to ensure their equal protection under the law. Since its inception, PRLDEF has worked to politically empower the Puerto Rican and Latino communities. Barriers to Latino political participation have been lifted, and voting rights violations have been successfully challenged by PRLDEF

in the courts and before the United States Department of Justice. PRLDEF is currently working to ensure an equal opportunity for Puerto Ricans and other Latinos in the redistricting process, which is, and has been, occurring throughout the country as a consequence of the decennial census.

SUMMARY OF ARGUMENT

The district court's opinions in this case fundamentally misunderstand the Voting Rights Act of 1965 and the Fifteenth Amendment. Reapportionment is an inherently political process, and this Court has authorized judicial intervention only when the process results in a plan that violates a federal constitutional or statutory provision.

Nonetheless, the judgment below should be affirmed because the challenged plan violated the principles of equipopulous districting laid out by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny.[1] Once a constitutionally significant deviation in population among districts has been shown, the State bears the burden of justifying the deviation. In challenges to state legislative apportionments, this burden is triggered by a total population deviation of more than ten percent. *Brown v. Thompson*, 462 U.S. 835 (1983). In this case, it is

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[1] Under *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979), appellees, and thus *amici* supporting them, can defend the judgment "on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the District Court ...." We urge the Court to affirm solely on the narrow, albeit constitutional ground, that appellants failed to meet their burden of proof with regard to the one-person, one-vote issue.

undisputed that the challenged plan had a deviation of nearly thirteen percent. Nonetheless, appellants [hereafter the Apportionment Board] provided no evidence to substantiate their claim that the deviation was justifiable. In fact, at least a portion of the deviation was on its face unrelated to the professed state policy. Since the Apportionment Board failed to meet its burden of justifying an otherwise-unconstitutional deviation, the challenged plan must be invalidated.

But while the District Court correctly held that the Plan violated the Fourteenth Amendment on one-person, one-vote grounds, the remainder of its analysis was seriously flawed. To ensure that judicial invalidation of a plan developed and adopted by a state's political branches is warranted, Congress and this Court have required district courts to engage in an intensely local appraisal of the design and impact of a challenged plan, and to make detailed findings of fact. *Thornburg v. Gingles* and the Senate Report accompanying the 1982 amendments to the Voting Rights Act delineate a range of relevant factors for courts to consider.

But because state political entities, unlike federal courts, have inherent authority to engage in reapportionment, they are simply not subject to the same procedural and factfinding constraints. States are free to devise a variety of reapportionment processes, and to select from among a virtually infinite array of constitutionally and statutorily acceptable plans.

In this case, the district court turned these well-developed principles upside down. It required state political actors to follow the *Gingles*-Senate Report framework as a prerequisite to *adopting* a plan but it completely disregarded the framework as a prerequisite to

its own action in judicially *invalidating* the plan. The court below struck down Ohio's reapportionment plan [hereafter "the Plan"] without identifying *any* facts that would justify finding either a constitutional or a statutory violation. Because the district court never found that plaintiffs would suffer any cognizable injury as a result of the challenged plan -- indeed, plaintiffs' theory of the case was self-contradictory -- it erred in striking down the plan as violative of the Voting Rights Act. Moreover, the district court's treatment of the Fifteenth Amendment issue was shockingly offhanded: it simply asserted, without any discussion of underlying facts, that the plan was intentionally discriminatory.

ARGUMENT

I. THE CHALLENGED PLAN VIOLATED THE FOURTEENTH AMENDMENT'S REQUIREMENT OF ONE-PERSON, ONE-VOTE

The central command of the equal protection clause with respect to state legislative apportionment is clear: the "basic constitutional standard" of one-person, one-vote requires a State to "make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Reynolds v. Sims,* 377 U.S. 533, 568, 577 (1964). If districts are malapportioned, the ballots cast by voters in heavily populated districts will be devalued relative to the votes cast by individuals in less-populated districts. This form of vote dilution is characterized as *quantitative* because it is based on mathematical comparisons of various district sizes. *Nevitt v. Sides,* 571 F.2d 209, 215 (5th Cir. 1978).

In response to the two post-*Reynolds* rounds of reapportionment activity, this Court has set out a clear analytic framework for assessing claims of quantitative vote dilution. In this case, application of the framework shows that the challenged plan failed to pass muster under the equal protection clause.

A. *The Analytic Framework for Evaluating Claims of Quantitative Vote Dilution*

Because the right to vote is so fundamental to the governance of a democratic society, "any alleged infringement ... must be carefully and meticulously scrutinized." *Reynolds*, 377 U.S. at 562. Accordingly, once a plaintiff has made a prima facie showing of constitutionally significant population deviation, the State bears a heavy justificatory burden. This Court's decisions provide a three-step process for assessing this question.

1. *Proof of a Prima Facie Case*

The first step is to ask whether there is a constitutionally significant deviation in population among districts. In the context of state legislative reapportionment, this Court has squarely held that a total deviation of ten percent establishes a prima facie case. *See Brown v. Thompson*, 462 U.S. 835, 843 (1983); *White v. Regester*, 412 U.S. 755, 764 (1973). The plaintiffs bear the burden of proof on this issue, and if they fail to satisfy this "threshold requirement," their claim must be dismissed. *See id.* (deviation of 9.9% fails to meet threshold); *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973) (deviation of 7.83% fails to meet threshold).

Once plaintiffs have established a prima facie case, however, the burden shifts: Constitutionally significant deviations "must be justified by the State." *Brown v. Thompson*, 462 U.S. at 843. If the State fails to provide a sufficient justification, then the challenged plan must be invalidated.

2. *Identification of a Serious State Interest Served by the Deviation*

The second step of the process asks whether the challenged plan furthers a rational, legitimate state policy. *See, e.g., Brown v. Thompson,* 462 U.S. at 843-44; *Mahan v. Howell*, 410 U.S. 315, 324-26 (1973); *Abate v. Mundt,* 403 U.S. 182, 185-86 (1971); *Reynolds*, 377 U.S. at 577-81. Here, the State bears the burden of proof. And it is not enough simply to identify a potentially legitimate policy. Rather, the State must show why its "particular circumstances and needs," *Abate v. Mundt,* 403 U.S. at 185, justify more than the constitutionally *de minimis* variations already accounted for by the ten percent threshold.

That this second step requires an intensely local appraisal of the basis for the deviation can be seen from this Court's painstaking discussion of the particular governmental schemes at issue in previous one-person, one-vote cases. Although the Court has stated that preservation of subdivision boundaries may allow *some* deviation, *see, e.g., Brown v. Thompson*, 462 U.S. at 843-44; *Mahan v. Howell,* 410 U.S. at 325-27; *Reynolds*, 377 U.S. at 580-81, it has been equally clear that prior cases provide no blanket license for departures from equipopulous districting. In *Abate v. Mundt*, for example, the Court emphasized the fact that the same individuals occupied the governing positions both in the county

legislature and on the boards of supervisors of the constituent political subdivisions to justify an 11.9 percent total deviation that it would otherwise have been "hesitant to accept ...." *Id.* at 186. Similarly, in *Mahan v. Howell*, the Court pointed to the distinctive role of the Virginia General Assembly in enacting local legislation as a reason for upholding a plan whose 16.4 percent total deviation came close to "approach[ing] tolerable limits," 410 U.S. at 329. Finally, in *Brown v. Thompson*, the Court found a policy of giving each county its own representative had "particular force, given the peculiar size and population of the State [of Wyoming] and the nature of its governmental structure." 462 U.S. at 844. Of special significance to the present case, some Wyoming counties were so much smaller than an ideal district that their interests as counties would be totally submerged if they were combined with other counties to form equipopulous districts. *See id.* at 841 n. 5. In short, in each case, the Court has required a showing that the articulated policy was rational and legitimate in light of the State's particular governmental structure.

3. *Proof of a Close "Fit" Between Deviation and Policy*

The third step requires the State to show a close degree of "fit" between the actual deviations created by the challenged plan and the permissible state policy. It must show that the deviations incurred under its plan are necessary to the achievement of that policy. *Compare, e.g., Mahan v. Howell*, 410 U.S. at 326 (approving plan because it "produces the minimum deviation above and below the norm" attainable), *with Chapman v. Meier*, 420 U.S. 1, 25 (1975) (invalidating plan, despite legitimacy of state policy, because it was possible to achieve policy with plan using a smaller deviation), and *Kilgarlin v. Hill*, 386 U.S.

120, 124 (1967) (per curiam) (same). If alternative plans could achieve the State's goal while more closely complying with one-person, one-vote, then the deviation is unjustified.

B. *The Failure of the Challenged Plan*

That the challenged Plan is prima facie unconstitutional is clear. According to the 1990 census, Ohio has a total population of 10,847,133. App. to Juris. St. 49a. Since the Ohio House has 99 members, the ideal House district size is 109,567. *Id.* at 21a. Under the Plan, the smallest district, comprised solely of Ashtabula County, had a population of 99,821, *id.* at 52a n. 11, or 91.10 percent of an ideal district. The largest district, one of thirteen in Cuyahoga County, had a population of 114,955, *id.* at 56a, or 104.92 percent of an ideal district. Thus, the total population deviation of the Plan was 13.82 percent, well over the ten percent threshold.[2]

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[2] Ohio law would have permitted up to a 20 percent total deviation. *See* Ohio Const. art. XI, § 9 (requiring that "reasonable effort shall be made to create a house of representatives district consisting of the whole county" for any county that is at least 90 percent of the ideal district size and for any county that is not more than 110 percent of the ideal district size). Such a deviation would clearly raise serious questions: indeed, it is not clear that *any* legitimate policy could justify it. *See Mahan v. Howell*, 410 U.S. at 329; *cf. Brown v. Thompson*, 462 U.S. at 850 (O'Connor, J., concurring); *id.* at 853-56 (Brennan, J., dissenting).

To the extent, however, that the district court based its invalidation of the 1992 Plan on the statutory authorization of a 20 percent total deviation, rather than on the actual deviation created, *see* App. to Juris. St. 147a n. 12, it was mistaken: the real question in a one-person, one-vote case is whether the challenged plan unconstitutionally dilutes some citizens' votes, not whether a another

In the face of this presumptively unconstitutional malapportionment, the Apportionment Board has raised only the most perfunctory defense: "Ohio's longstanding policy to reflect political subdivision boundaries where reasonably possible." Juris. St. at 25. The Board has provided no details about Ohio's state or local governmental structure that might justify elevating artificial subdivision boundaries above a fundamental constitutional command. A bare citation of *Mahan v. Howell* and *Brown v. Thompson* cannot substitute for the detailed description of "particular circumstances and needs," *Abate v. Mundt*, 403 U.S. at 185, that this Court has always required. Unless this Court is prepared to abdicate completely its commitment in *Reynolds* to give "careful judicial scrutiny" to claims regarding political subdivision boundaries, 377 U.S. at 580-81, it simply cannot countenance appellants' desultory justification in this case.

Moreover, regardless of the legitimacy of Ohio's purported policy, the Apportionment Board failed to show that the deviations incurred under the Plan were entirely necessary to the achievement of that policy. First, it presented no evidence that the portion of the total deviation attributable to the size of the most populous district had *anything* to do with the purported policy. While the smallest single district is a whole-county district, the largest district is *not*. Rather, it is one of *thirteen* Cuyahoga County districts. *See* App. to Juris. St. 56a. Merely by redrawing districts entirely *within* Cuyahoga County, the total deviation of the Plan could have been reduced without any impairment whatsoever of the policy

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hypothetical plan might do so.

of preserving subdivisions.[3] Second, it is not altogether clear, given the number of split-county districts adjacent to Ashtabula County, *see Voinovich v. Ferguson*, 586 N.E.2d 1020, 1038-39 (Ohio 1992) (Resnick, J., dissenting), that portions of counties that were being split among districts anyway could not have been added to the Ashtabula-based district to bring it closer to the ideal district size. Given that Ashtabula would still have formed the vast majority of the district, it would have enjoyed an effective voice as a subdivision. *Cf. Brown v. Thompson*, 462 U.S. at 841 n. 5 (where Niobrara County was so small that it would be completely swamped in a multi-county district, deviation needed to give it its own district might be justified).

None of this is to say that it would have been impossible for the Apportionment Board to justify the deviations in the Plan. But the fact remains: it did not do so. Accordingly, this Court should affirm the holding of the district court that the Board "fail[ed] to provide sufficient justification for" a greater than ten percent total deviation.

II. THE DISTRICT COURT'S ANALYSIS OF THE CLAIM OF RACIAL VOTE DILUTION WAS FATALLY FLAWED

"From the beginning," this Court has maintained that "reapportionment is primarily a matter for legislative

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[3] Indeed, there is a substantial [9.2 percent] population deviation *among* Cuyahoga County districts: the smallest has a population of 104,872, while the largest has a population of 114,955. App. to Juris. St. 56a.

consideration and determination" and that "state legislatures have primary jurisdiction over legislative reapportionment." *White v. Weiser,* 412 U.S. 783, 794-95 (1973) (internal quotation marks omitted). Decisions about how to organize the legislature and how to allocate political power among competing groups lie at the very heart of democratic self-governance. Judicial intervention is warranted only when the normal, political -- almost inevitably partisan -- process fails.

Thus, the State's political agencies and the federal judiciary operate under very different constraints when they participate in the districting process. For example, if a court is called upon to develop a districting system for state offices, it must adhere far more closely to the one-person, one-vote standard than would a state legislature: a court must provide "some compelling justification" for deviations that would not demand any justification whatsoever were they created by a legislative plan. *See, e.g., Connor v. Finch,* 401 U.S. 407, 416-21 (1977); *see generally* Daniel R. Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself,* 4 J.L. & Pol. 653, 662-64 (1988).

In this case, the court below made two critical errors. First, it imposed too onerous a standard on Ohio by requiring the Apportionment Board to undertake a full-blown section 2 liability analysis as part of its reapportionment process. Second, it improperly relaxed the constraints upon itself by invalidating a democratically created plan without undertaking any section 2 analysis at all.

A. *The Voting Rights Act Did Not Require the Apportionment Board to Use a Particular Analytic Framework as a Prerequisite for Reapportionment*

In the district court's January 31 opinion, the two reasons given for invalidating Ohio's Plan were that James Tilling, the Plan's architect, erroneously thought that the Voting Rights Act required him to maximize the number of districts with effective black voting majorities, *see* App. to Juris. St. 8a-10a, and that Tilling failed to conduct an adequate section 2 totality-of-the-circumstances analysis, *id.* at 11a-14a. Neither reason provides any basis for enjoining the Plan.

First, Tilling's opinion about the mandates of the Voting Rights Act is entirely irrelevant to the question whether the plan he produced passed muster under the Act. Thus, this Court need not address the question whether Ohio was *compelled* by the Voting Rights Act to create a significant number of majority-black districts. The only question properly before this Court is whether the Voting Rights Act *permitted* Ohio to take that tack.

As to this, the answer is plainly affirmative. In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), this Court upheld a voluntary, race-conscious districting plan for state legislative seats in Kings County, New York (Brooklyn). Justice White, joined in that part of his opinion by Justices Stevens and Rehnquist, noted that there was "no doubt that in preparing the [districting plan], the State deliberately used race in a purposeful manner," *id.* at 165: the State had intentionally drawn several districts with effective black voting majorities of between 65 and 90 percent, *see id.* at 151-52. Nevertheless, because the plan could be viewed as seeking "to achieve a fair allocation of political power between

white and nonwhite voters in Kings County," *id.* at 167, it was permissible.[4] Of particular salience to this case, *UJO* did not uphold the New York plan because the plan was necessarily *required* by the Voting Rights Act; rather, it upheld the plan because it represented one of potentially many acceptable responses to the political realities of Kings County.[5]

Moreover, to say that a State cannot pay attention to race in drawing districts ignores reality. By its very nature, the essence of the districting process is the aggregation of people by virtue of their group characteristics, whether these be geographical, political, social, or racial. *Cf. Reynolds v. Sims*, 377 U.S. at 623-24 (Harlan, J., dissenting). The reality of American life is

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[4] Although *UJO v. Carey* produced several opinions, only then-Chief Justice Burger explicitly disagreed with Justice White's analysis, and Justice Stewart, joined by Justice Powell, reached a conclusion on this issue essentially identical to Justice White's. *See* 430 U.S. at 179-80.

[5] Similarly, in *Gaffney v. Cummings*, this Court upheld a "bipartisan gerrymander" of the Connecticut State Assembly because the resulting plan "purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." 412 U.S. at 754. The Court noted that:

> The Board also consciously and overtly adopted and followed a policy of "political fairness," . . . . Senate and House districts were structured so that the composition of both Houses would reflect "as closely as possible . . . the actual [statewide] plurality of vote on the House or Senate line in a given election."

Id. at 738.

The Court's discussion frequently relied on racial vote dilution cases in reaching its conclusion, *see id.* at 753, 754, thus suggesting that a similar analysis would apply in the context of claims of race-conscious but fair districting.

that black communities are often geographically compact and that black voters often share a variety of socioeconomic characteristics that affect their voting behavior. Since the demographic profiles of a State "are available precinct by precinct, ward by ward," *Gaffney v. Cummings*, 412 U.S. at 735, it would be essentially impossible for a districting body not to foresee the likely racial impact of possible apportionment schemes.

Second, since the Apportionment Board was not required to justify its decision to draw majority-black districts by first establishing that alternative approaches would violate section 2, it had no obligation to conduct any formal inquiry before proposing its plan. The district court's holding to the contrary reflects a complete misunderstanding of the basis of the Apportionment Board's authority.

To ensure that judicial invalidation of a democratically adopted plan is warranted, Congress and this Court have required district courts to engage in an intensely local appraisal of the design and impact of a challenged plan, and to make detailed findings of fact. *Thornburg v. Gingles* and the Senate Report accompanying the 1982 amendments to the Voting Rights Act create a detailed analytic structure for this necessary judicial factfinding. *See Thornburg v. Gingles*, 478 U.S. at 46-51; S. Rep. No. 97-417, pp. 28-29 (1982) ["Senate Report"]. The district court must "consider the totality of the circumstances and ... determine, based upon a searching practical evaluation of the past and present reality .... [and] an intensely local appraisal of the design and impact of the contested electoral mechanisms" whether black voters have an equal opportunity to participate and elect their preferred candidates. *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted).

The totality-of-the-circumstances inquiry mandated by the Senate Report and *Gingles* is a prerequisite to finding section 2 liability. But neither Congress nor this Court has ever required states to undertake a similarly painstaking analysis before they enact a plan in the first instance. Such a requirement would run roughshod over longstanding principles of federalism and deference to the political branches in this most quintessentially political of endeavors. Of course, states are free to consider various *Gingles* or Senate Report factors in developing their plans, and prudent plan drawers might seek to avoid the later invalidation of their plans by thinking about whether the plans comply with section 2. And legislatures should review alternative plans to ensure that the plan they ultimately select does not dilute minority voting strength. But as long as the plan a State ultimately adopts does not violation section 2, the analysis a State used to arrive at that plan is not subject to being questioned separately.

In short, the district court's January 31 opinion provided absolutely no basis for invalidating Ohio's Plan.

B. *The District Court Itself Failed to Comply With Section 2's Requirements*

Because it was preoccupied with its idiosyncratic theory imposing upon the Apportionment Board the obligation to follow *Gingles*' analytic framework, the court below completely neglected to follow section 2 itself. The district court failed to find a single fact that would justify a conclusion that Ohio's Plan violated the Voting Rights Act.

To begin with, the district court completely flouted *Gingles*' directive to conduct an "intensely local appraisal

of the design and impact of the contested electoral mechanisms." 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). In *Gingles* itself, after all, this Court upheld North Carolina's use of a multimember district in the Durham area despite finding such districts invalid in other parts of the State. *See id.* at 77. And it specifically disapproved of lumping different challenged districts together: "The inquiry into the existence of vote dilution ... is district-specific. When considering several separate vote dilution claims in a single case, courts must not rely on data aggregated from all the challenged districts ...." *Id.* at 59 n. 28. In this case, however, one can search the district court's opinions in vain for *any* description of the characteristics of the various challenged districts that result in the denial of an equal opportunity for black voters to elect their preferred candidates. Indeed, the majority opinion does not even identify the challenged districts by number. The closest it comes to discussing any relevant information about the challenged districts is to mention the "average plurality" received by black candidates in various unidentified districts in various unspecified elections sometime between 1984 and 1990, App. to Juris. St. 7a, and to refer to the level of crossover voting in some districts, *id.* at 133a. But the court made no factual findings at all with regard to the socioeconomic disparities, past election results, campaign issues or any other Senate Report factor.

As a consequence, the district court never identified how black voters were actually injured by the challenged plan. It referred to plaintiffs' contention that the Plan involved both improper "packing" and "cracking," App. to Juris. St. 7a, but it never identified where either of these injuries occurred.

This cavalier treatment not only defied the clear requirements of *Gingles*; it also flouted the requirement of Fed. R. Civ. P. 52(a) that the court make findings of fact sufficient to permit intelligent appellate review. Even the most cursory comparison of the opinions in this case with the detailed treatment of racial vote dilution claims by two district courts whose conclusions were affirmed by this court -- *see Thornburg v. Gingles*, *see Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984), *aff'd* 478 U.S. 30 (1986); *Jeffers v. Clinton*, 730 F. Supp. 196, 204-05 (E.D. Ark. 1989) (three-judge court), *summarily aff'd*, 111 S. Ct. 662 (1991) -- shows how far short of the mark the opinions in this case fell. And for a court to devote one sentence, with no factual support, to a holding that the State of Ohio was deliberately racist in adopting the Plan -- the clear import of its finding that there was a Fifteenth Amendment violation, *see* App. to Juris. St. 119a -- is judicially irresponsible. Moreover, it is not defensible under this Court's precedent. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55 (1980).

Moreover, had the district court paid any serious attention to the issue, it would soon have seen that plaintiffs' theory of their case contained within itself its own rebuttal. Plaintiffs began by claiming that under the 1981 apportionment scheme, some black voters in particular majority white districts were nonetheless able to elect the candidates of their choice. *See* App. to Juris. St. 7a, 13a, 132a-33a.[6] If that is true (and *amici* take no

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[6] We also note, by the way, the essential triviality of evidence of responsiveness such as the voting records of white legislators who are not dependent on the support of the black community for their continued tenure. Although the district court pointed to such evidence, *see* App. to Juris. St. 7a, it failed to heed the Senate Report's directive that "proof of some responsiveness" is not

position on that question), then, at least as to those districts, there was no legally significant racial bloc voting. *See Thornburg v. Gingles*, 478 U.S. at 54-61 (discussing the concept). But if there was no legally significant racial bloc voting under the 1981 plan, then unless plaintiffs can show that the 1991-92 Plan somehow generates legally significant racial polarization -- and there is nothing in the record to support this claim -- they cannot demonstrate one of the two "most important Senate Report factors," namely, racial bloc voting. *Thornburg v. Gingles*, 478 U.S. at 48 n. 15.

Because the district court failed to find *any* of the facts that tend to show that under a challenged plan, blacks have less opportunity than other citizens to participate in the political process and elect the representatives of their choice, it had absolutely no basis for striking down the Plan as violative of the Voting Rights Act. The complete failure to conduct the required "intensely local appraisal" makes this case an inappropriate vehicle for considering fine points about how courts should assess section 2 challenges. Thus, contrary to the Solicitor General's invitation, *see* Brief for the United States as Amicus Curiae Supporting Appellants at 10, 15-16, this Court should not address the broader questions of whether and how each of the *Gingles* preconditions should apply to state reapportionment

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particularly probative. *See* Senate Report at 29 n. 116. In part because the finding of responsiveness is so subjective and so dependent on which aspects of legislative performance are deemed relevant, courts have generally avoided the inquiry. *See, e.g., Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), *aff'd*, 478 U.S. 30 (1986).

plans.[7]

C. *The District Court's Holding on Plaintiffs' Fifteenth Amendment Claim was Unsupportable*

The district court's treatment of the Fifteenth Amendment issue is unfortunately typical of its overall approach to this case. Almost as an aside in its March 10 Order, the district court included one sentence: "As noted in the Conclusion of our January 31, 1992 order and opinion, it has heretofore been unnecessary in these proceedings to reach the constitutional issue presented, but we now proceed to decide that the plan as submitted is also violative of the Fifteenth Amendment of the United States Constitution." App. to Juris. St. 119a. That sentence -- and a brief assertion that the Board must have intended to dilute black voting since that is the likely effect of the Plan, *id.* at 141-42a -- is the sum total of the lower court's analysis of plaintiffs' claim that the State of Ohio deliberately set out to deny its black citizens their fundamental constitutional right to vote.

It is hardly surprising that the district court cited no case law from this Court in support of its holding, for to cite the only case in which this Court has struck down a State's delineation of district boundaries on Fifteenth Amendment grounds would have showed the complete absurdity of the district court's holding. There is nothing in this record to suggest that Ohio's decision to draw several majority-black legislative districts even remotely

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[7] If the Court ultimately remands this case for further proceedings in the district court, those issues can be addressed in the first instance in the context of the kind of detailed factfinding required in section 2 cases.

resembles Alabama's complete exclusion of black voters from Tuskegee, *see Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

Amici emphasize that we take no position on the sort of proof of discriminatory intent which might establish a *Fourteenth* Amendment violation: that issue was neither raised, briefed, nor decided below and this Court therefore should not reach it. *But cf. Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (setting out the standard for assessing Fourteenth Amendment-based claims of racial vote dilution). We argue here only that no *Fifteenth Amendment* violation has been shown. The court below erred in transforming its disagreement with the political philosophy of the Ohio Apportionment Board into a constitutional condemnation of the Board as intentionally discriminatory.

CONCLUSION

This Court should affirm the judgment below solely on the ground that the Board failed to provide sufficient justification for the maximum population deviation among districts.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The *amici* consist of Members of Congress and state legislators who are members of a class of citizens protected by the Voting Rights Act, 42 U.S.C. § 1973. The *amici* are intended beneficiaries of the Voting Rights Act and have a strong interest in the issues presented in this case. The *amici* seek to ensure that the Act is not weakened or employed to limit the political power of minority voters.

The Voting Rights Act has enhanced the opportunity for minority citizens to fully participate in the political process and elect representatives of their choice. Since the passage of the Act, the number of African-American and Hispanic elected officials in the United States has increased dramatically to more than 11,000. *See* National Association of Latino Elected And Appointed Officials, *National Roster of Hispanic Elected Officials* (1991); Joint Center for Political and Economic Studies, *Black Elected Officials, A National Roster* (1991).

The *amici* do not agree with the United States *amicus* that the protection of the Voting Rights Act is only available to minority citizens who satisfy the three preconditions established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986). Such an approach would severely weaken the scope of the Act. The standard outlined in *Gingles* was not designed to resolve the type of vote dilution claim presently before this Court, a single-member district packing claim. Nevertheless, judicially manageable standards do exist to measure appellees' vote dilution claim and the *amici* propose such a standard.

A jurisdiction does not satisfy the requirements of the Act by simply maximizing the number of "majority minority" districts while dispersing the remaining minority population into overwhelmingly white districts. The Act was intended to be inclusive and provide for the development of bi-racial coalitions, not to limit the electoral in-

fluence of minority voters by packing them into a minimum number of districts.

The *amici*, in their official positions, have sought to foster bi-racial or multi-racial coalitions in both the legislative chambers and their own districts. The development of these coalitions is the essence of American democracy. Maximizing majority minority districts by politically segregating minority voters would destroy these coalitions and reduce the electoral power of minority voters.

The *amici* urge this Court to affirm the decision of the district court. An affirmation would preclude future efforts to limit minority voting strength by packing minority voters into a minimum number of districts.

Pursuant to Rule 37 of the Supreme Court of the United States, written consent of all the parties was requested. Appellants and appellees have granted their consent to the filing of this brief as *amici curiae*.

STATEMENT OF THE CASE

In the interests of brevity, the *amici* adopt the statement of the case set forth in the brief of the *Quilter* appellees.

SUMMARY OF ARGUMENT

1. The district court properly found that the Ohio Apportionment Board diluted the voting strength of African-American voters by increasing the African-American percentage in districts presently electing African-American representatives and invariably reducing the African-American percentage in the neighboring districts. A jurisdiction may not increase the minority population of a district which regularly elects the representative of choice of the minority community, unless necessary to continue to provide the minority community with such an opportunity. Any unnecessary increase, coupled with a corresponding decrease of minority popu-

lation in a neighboring district to a level insufficient to provide an opportunity to elect a representative of choice, dilutes minority voting strength. In addition, judicially manageable standards exist to measure appellees' vote dilution claim.

2. The preconditions established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), were limited to challenges to multimember districts and not applicable to appellees' § 2 claim, a single-member district packing claim. The application of the *Gingles* preconditions to all § 2 claims would severely limit the scope of the Voting Rights Act and would be inconsistent with congressional intent. Nothing in the Act or accompanying legislative history indicates that minority voters must reach a certain numerical level to receive its protection. An electoral system can still have a discriminatory effect even if minority voters cannot comprise a majority in a single-member district.

3. The Voting Rights Act was not intended to result in the political segregation of minority voters into a few districts, limiting their electoral influence, unless absolutely necessary to ensure the minority community an opportunity to participate in the political process and elect representatives of their choice. Under the guise of protecting minority voting rights, the Ohio Apportionment Board ignored the existence of coalitional voting and sought to limit the electoral strength of minority voters for solely partisan purposes by maximizing the number of majority minority districts while dispersing the remaining minority population into overwhelmingly white districts. The district court properly held that the Board's intent to pack and fragment African-American voters violated § 2 of the Voting Rights Act and the Fifteenth Amendment.

ARGUMENT

I. THE MINORITY POPULATION OF A DISTRICT THAT REGULARLY ELECTS A MINORITY REPRESENTATIVE MAY NOT BE INCREASED UNLESS NECESSARY TO CONTINUE TO PROVIDE THE MINORITY COMMUNITY AN OPPORTUNITY TO ELECT A REPRESENTATIVE OF THEIR CHOICE.

The district court found that the Ohio Apportionment Board diluted the voting strength of African-American voters by increasing the African-American percentage in districts presently electing African-American representatives and invariably reducing the African-American percentage in the surrounding districts absent any justification. J.S. App. 130a. The district court's decision was not clearly erroneous and its decision should be affirmed.[1]

A jurisdiction may not increase the minority population of a district which regularly elects the representative of choice of the minority community, unless necessary to continue to provide the minority community with such an opportunity. Any unnecessary increase, coupled with a corresponding decrease of minority population in a neighboring district to a level insufficient to provide an opportunity to elect a representative of choice[2] in the neighboring district dilutes minority voting strength.

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[1] In *Thornburg v. Gingles*, 478 U.S. 30, ..) the Court determined that the clearly erroneous test of Fed. R. Civ. P. 52(a) "is the appropriate standard for appellate review of a finding of vote dilution."

[2] A candidate of choice of the minority community is not necessarily of any particular racial or ethnic origin. In *Armour*, 775 F. Supp. 1044 (N.D. Ohio, 1991), the district court declared that "the defendants misapprehend the requirements of the Voting Rights Act. The issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a *candidate of choice* . . . we find that plaintiffs could elect a candidate of their choice, although not necessarily of their race, in a reconfigured district." *Id.* 775 F. Supp. at 1059-1060 (emphasis in original).

A. Minority Vote Dilution May Result From The Overconcentration or Packing of Minority Voters.

The minority vote dilution found by the district court resulted from the packing (or overconcentration) of African-American voters into several districts.[3] Packing African-American voters into one or a few districts in numbers beyond the proportion needed to exercise effective political control of the district "wastes" African-American votes that could be used to control or influence elections in other districts. Although African-American voters "within each concentrated district have an obviously strong opportunity to elect representatives of their choice . . . , the adverse results may be identifiable in terms of what might otherwise have occurred elsewhere." *Rybicki v. State Board of Elections of Illinois*, 574 F. Supp. 1147, 1152 (N.D. Ill. 1983). The Ohio Apportionment Board packed minority voters into a minimum number of districts, "wasting" minority votes that could have a significant impact in neighboring districts. J.S. App. 7a-8a.

There is no set percentage at which minorities can be said to be unlawfully packed. An appraisal of local factors must be conducted to determine the percentage necessary to provide minority voters an opportunity to elect candidates of choice and a determination made whether the percentages in the districts in question exceed this figure.[4] A review of the local factors conducted by the district court in Ohio indicated the low threshold necessary to provide African-American voters an oppor-

[3] Packing is the overconcentration of minority voters into a district to prevent them from having a majority or significant influence in adjoining districts. Parker, *Black Votes Count*, p. 51 (1990).

[4] This approach is consistent with the intent of the Senate Report to require a fact intensive test and a "searching practical evaluation of the past and present reality" for § 2 violations. S. Rep. No. 417, 97th Cong., 2d Sess. 28 (hereinafter "S. Rep."), *reprinted in*, 1982 U.S.C.C.A.N. 177.

tunity to elect candidates of their choice.[5] Other courts have recognized the fact-specific nature of the inquiry in vote dilution claims. *See Rybicki*, 574 F. Supp. at 1152 (court rejected packing claim on grounds that high percentage of minority voters was necessary to compensate for the low minority turnout); *Latino Political Action Committee v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (court found racially polarized voting necessitated "packed" districts).

In *Latino Political Action Committee*, the First Circuit rejected a packing claim following a jurisdiction-specific analysis of the voting patterns of minorities and whites in Boston. The court noted that "a degree of 'packing' is necessary, where polarized voting exists, to account for the fact that say, Black or minority voters do not vote as completely cohesive blocs. In fact, the *less* cohesive the bloc, the *more* 'packing' needed to assure, say a Black representative (though, of course, the less polarized the voting, the less the need to seek that assurance)." *Id.* 784 F.2d at 414 (emphasis in original).

The most important condition affecting the minority percentage that may be considered packed is the degree of racial bloc voting. There is no need to create districts with high concentrations of minorities if there is little or no significant racial bloc voting in a jurisdiction. In *Latino Political Action Committee*, the court found a moderate degree of racially polarized voting and a minority population that did not necessarily vote as a bloc, hence concluding that the 82% African-American district was not "packed." *Id.*

On the other hand, the district court in Ohio found little, if any, evidence of polarized voting. J.S. App. 133a. Instead, the court found widespread coalition voting. J.S. App. 141a. Furthermore, African-Americans were turning out at rates comparable to whites. For these two

[5] All state legislative districts, in Ohio, over 35% African-American presently elect an African-American to office. J.S. App. 141a.

reasons, the percentage African-American needed to constitute packing is far lower than in either the *Rybicki* case or the *Latino Political Action Committee* case. The fact that all districts with African-American populations of 35% or greater elected African-Americans to office is also a clear indication that districts with far greater percentages of African-Americans would constitute packing.

Based on a review of local factors in Ohio, the court properly found that the Ohio Apportionment Board unlawfully packed African-American voters. J.S. App. 141a. The lack of legally significant racial bloc voting, high turnout rates of African-Americans, and the extensive degree of coalitional voting between African-Americans and whites are all factors supportive of appellees' packing claim.

B. A Judicially Manageable Standard Exists to Measure Appellees' Vote Dilution Claim and the District Court Properly Concluded That the Apportionment Board's Plan Diluted Minority Voting Strength.

In 1982, Congress amended § 2 of the Voting Rights Act, 42 U.S.C. § 1973(2), to restore the legal standard that governed voting discrimination cases prior to this Court's plurality opinion in *Mobile v. Bolden*, 446 U.S. 55 (1980). S. Rep. at 27, 1982 U.S.C.C.A.N. at 205. To establish a § 2 violation under *Bolden*, minority voters had to prove discriminatory intent. *Bolden*, 446 U.S. at 66. The 1982 amendments establish that a violation of § 2 can be proved by showing that a challenged electoral system or practice has a discriminatory effect on minority voters. The Senate Report accompanying the amendments established as the relevant legal standard the "results test," applied in *White v. Regester*, 412 U.S. 755 (1973), and also elaborated on the circumstances that might be probative of a § 2 violation.[6] These factors are derived from the

[6] Typical factors include:

"1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members

analytical framework used by this Court in *White*, *supra*, as articulated by the Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir., 1973), *aff'd sub nom. East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) (*per curiam*). S. Rep. at 28 n. 113, 1982 U.S.C.C.A.N. at 207 n. 113.

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of the minority group to register, to vote, or otherwise to participate in the democratic process;

"2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

"3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

"4. if there is a candidate slating process whether the members of the minority group have been denied access to that process;

"5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate in the political process;

"6. whether political campaigns have been characterized by overt or subtle racial appeals;

"7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

"Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

"whether there is significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

"While these enumerated factors will also be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

"The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."

S. Rep. at 28-29, 1982 U.S.C.C.A.N. at 206-207.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), a majority of this Court determined that "(w)hile many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in *multimember* districts," three preconditions are necessary to prove that the "multimember districts operate to impair minority voters' ability to elect representatives of their choice." *Gingles*, 478 U.S. at 48 (emphasis added):

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters inability to elect its candidates . . . Second, the minority group must be able to show that it is politically cohesive . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.

Id. 478 U.S. at 50-51 (emphasis in original).

The majority of the Gingles Court expressly limited the application of these preconditions to a claim challenging the use of multimember districts and reserved judgment on its application to other types of vote dilution claims:

> We have no occasion to consider whether § 2 permits, and if it does what standards should pertain to, a claim brought by a minority group, which is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.
>
> We note also that we have no occasion to consider whether the standards we apply to respondents' claim

> that multimember districts operate to dilute the vote of geographically cohesive minority groups, which are large enough to constitute majorities in single-member districts and which are contained within the boundaries of the challenged multimember districts, are fully pertinent to other sorts of vote dilution claims, such as a claim alleging that the splitting of a large and geographically cohesive minority between two or more multimember or single-member districts resulted in the dilution of the minority vote.

Id. 478 U.S. at 47-48 n. 12 (emphasis in original).

The standard outlined by this Court in *Gingles* was not designed to resolve the type of vote dilution claim presently before this Court. The claim in *Gingles* was one of minority submergence in multimember districts. In this particular instance, the claim is of unlawful packing of minority voters in single-member districts. The three preconditions outlined in *Gingles* are not applicable to single-member packing claims. Nevertheless, judicially manageable standards do exist to measure appellees' vote dilution claim.

In a packing claim, the initial inquiry is the minority percentage necessary to elect the representative of choice of the minority community. If the minority population percentage exceeds this figure, and it is possible, by reducing this percentage, to provide the minority community an opportunity to influence elections in neighboring districts, then a packing claim has been established.

The factors most important to establishing the percentage necessary to provide minority voters an opportunity to elect candidates of choice are the degree of minority cohesiveness, the extent of white crossover voting, and the turnout rates of minorities relative to whites. If the minority percentage in a district exceeds the necessary figure, then a court must determine whether reducing this percentage would give minorities an opportunity to in-

fluence elections elsewhere.[7] As Justice O'Connor noted in *Gingles*, the "power to influence the political process is not limited to winning elections." *Gingles*, 478 U.S. at 99 (O'Connor, J. concurring).

One measure of influence, as recognized by the district court, requires an analysis of the degree of minority support received by an elected representative and the responsiveness of that representative to minority interests as reflected in the representative's voting record on issues of importance to the minority community. J.S. App. 13a. Vote dilution is present if minority voters are overconcentrated in one district to the extent that the minority community is unable to elect a responsive representative in neighboring districts.

The district court found that the Ohio Apportionment Board created minority districts in excess of the African-American population percentage necessary to elect candidates of choice without valid justification. J.S. App. 141a. As a result of the overconcentration of minority voters in several districts, the African-American community is denied the opportunity to continue to elect responsive representatives in the neighboring districts.

II. THE THREE PRECONDITIONS ESTABLISHED BY THIS COURT IN *THORNBURG v. GINGLES* WERE LIMITED TO CHALLENGES TO MULTIMEMBER DISTRICTS AND THE DISTRICT COURT PROPERLY HELD THAT THESE PRECONDITIONS WERE NOT APPLICABLE TO APPELLEES' SECTION 2 CLAIM.

The United States as *amicus* argues that, despite the clear and unambiguous language in the *Gingles* opinion limiting the three preconditions to a challenge to multimember districts, these preconditions apply to all vote

[7] It may not be possible to decrease the minority percentage in a district if the minority population is highly residentially segregated. *See Rybicki*, 574 F. Supp. at 1152.

dilution claims under § 2. United States *amicus brief* at 14. The United States then argues that "given that legally significant racial bloc voting was not shown in Ohio to have prevented black voters from electing representatives of their choice . . . appellees simply cannot succeed on their claim that the 1992 plan results in dilution of black voting power in violation of Section 2 . . ." *Id.* at 15. In addition, the United States attacks the district court for holding that minority voters need not comprise a majority in a single-member district to prevail. *Id.*

The position of the United States is inconsistent with the legislative history of Section 2 and precedent of this Court. Moreover, the ability of minority voters to seek relief under the Voting Rights Act would be severely curtailed under the approach proposed by United States *amicus*.

A. The Application of the *Gingles* Preconditions to All Section 2 Claims Would Severely Limit the Scope of the Voting Rights Act and Would Be Inconsistent With Congressional Intent.

The intent of the 1982 amendments to § 2 was to ensure that minority voters have equal access to the political process. S. Rep. at 27, 1982 U.S.C.A.A.N. at 205.* Nothing in § 2 of the Voting Rights Act or its accompanying legislative history indicates that minority voters must reach a certain numerical level to receive its protection. To the contrary, the Act was designed to

* Section 2(b) provides in part:

"(b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . . ." 42 U.S.C. § 1973 (2) (b).

protect individual voters and not simply groups of voters of a sufficient size. Section 2 seeks to protect against the "denial or abridgement of the right of any *citizen* of the United States to vote on account of race or color . . ." 42 U.S.C. § 1973(2)(a) (emphasis added).

The position of the United States would deny members of a protected class unable to comprise a majority in a single-member district the protection of the Act. A redistricting plan can have a discriminatory effect on minority voters even if those voters are not sufficient in number to control the outcome of an election. This Court has acknowledged "any abridgement of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to *influence* the outcome of an election." *Chisom v. Roemer*, 111 S.Ct. 2354, 2365 (1991) (emphasis in original).

Moreover, as this Court has repeatedly noted, discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups are an impermissible denial of the right to have one's vote fully count just as much as an outright denial of access to the ballot box. *See Fortsen v. Dorsey*, 379 U.S. 433, 439 (1965). This Court has not limited the protection of the Voting Rights Act to minority citizens who can comprise a majority in a single-member district.

The argument of the United States that appellees cannot succeed without showing legally significant racially polarized voting ignores the intent of the Voting Rights Act and reveals the inapplicability of the *Gingles* preconditions to all types of § 2 claims. The district court agreed with the appellees' claim that the Ohio Apportionment Board, without justification, overconcentrated the African-American population into a few districts where African-Americans were already able to elect candidates of their choice. J.S. App. 7a-8a. The remaining African-American voters were fragmented among dis-

tricts where they would be unable to influence the outcome of an election. *Id.* In Ohio, African-American legislators have been consistently elected from districts with far less than an African-American majority due to the absence of significant racial bloc voting and the existence of coalitional voting between African-Americans and whites. J.S. App. 132a-133a.

The United States contends that if a jurisdiction experiences consistent electoral success of minority candidates in majority white districts, with the support of minority voters, minority voters can never succeed on a § 2 claim. United States, *amicus* at 15. The United States would apparently have no objection to jurisdictions creating districts that are 100% minority ("packing" minority voters) or no districts where minority voters could elect candidates of their choice ("fracturing") if the jurisdiction did not experience legally significant racially polarized voting. The United States is suggesting the elevation of one factor rather than an examination of the totality of circumstances as required in *White*, 412 U.S. at 413, and the Senate Report, S. Rep. at 29, 1982 U.S.C.C.A.N. at 207.

The United States seems to be proposing a return to the *Mobile v. Bolden*, 446 U.S. 55 (1980) standard. If the three preconditions of Gingles are not satisfied, then minority voters could not rely upon the discriminatory results test of § 2 and would instead need to establish discriminatory intent (either under the Voting Rights Act or the Fourteenth or Fifteenth Amendments). *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied* 111 S. Ct. 681 (1991); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Minority citizens would have no recourse under the Voting Rights Act if the discrimination against a protected class was borne not of racial, but of political, animus, although resulting in racially discriminatory effects. *See Davis v. Bandemer*, 478 U.S. 109 (1986).

B. This Court Has Recognized That the *Gingles* Preconditions Are Not Applicable to All Types of Vote Dilution Claims.

This Court has previously recognized that the *Gingles* preconditions are not applicable to all § 2 claims. *See Chisom*, 111 S. Ct. at 2368. In *Chisom*, the Court was asked to determine whether judicial elections are covered under § 2. The Louisiana Supreme Court consists of seven members, two of whom are elected at-large from one multimember district and the remainder elected from single-member districts. The Fifth Circuit Court of Appeals, sitting *en banc*, held that the Congress' use of the word "representative" in the phrase to "elect representatives of their choice" in § 2(b) of the Act indicated that Congress did not intend to authorize vote dilution claims in judicial elections. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (1990). Louisiana and a majority of the Fifth Circuit also suggested that no judicially manageable standards existed for fashioning relief for vote dilution claims challenging judicial elections. *Chisom*, 111 S. Ct. at 2368.

Since the "one person, one vote" requirement does not apply to judicial elections, the first prong of *Gingles* cannot be used as a standard.[9] However, this Court refused to adopt the position now offered by the United States and held that state judicial elections are "included within the ambit of § 2 as amended." *Chisom*, 111 S. Ct. at 2368. The Court rejected the argument that the failure to apply the principle of one person, one vote to judicial elections made these elections totally immune from vote dilution claims:

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[9] *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D.La. 1972), *aff'd.* 409 U.S. 1095 (1973) ("Judges do not represent people they serve people. Thus, the rationale behind the one-man, one-vote principle, which evolved out of efforts to preserve a truly representative form of government, is simply not relevant to the makeup of the judiciary").

> The standard that should be applied in litigation under § 2 is not at issue here. Even if serious problems lie ahead in applying the totality of circumstances described in section 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.

Id.

Lower courts have been divided on the applicability of the *Gingles* preconditions to challenges to single-member districts. Several courts have applied these preconditions to § 2 challenges to single-member districts.[10] Other courts have concluded that the preconditions are not necessarily applicable to all § 2 claims.[11] Still other courts have reluctantly applied the preconditions due to earlier decisions.[12]

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[10] *Hastert v. State Board of Elections*, 777 F. Supp. 634, 651-655 (N.D. Ill. 1991); *Illinois Legislative Redistricting Commission v. LaPaille*, 792 F. Supp. 1110 (N.D. Ill. 1991); *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989); *McDaniels v. Mehfoud*, 702 F. Supp. 588, 591 (E.D. Va. 1988); *Neal v. Coleburn*, 689 F. Supp. 1426, 1434-1435 (E.D. Va. 1988).

[11] *Armour v. Ohio*, 775 F. Supp. at 1052 ("based on . . . statements in *Chisom* and the Court's express disclaimers regarding the scope of its decision in *Gingles*, we cannot conclude that the Court intended the *Gingles* preconditions for challenges to multi-member districting schemes to apply to all § 2 claims"); *Garza v. County of Los Angeles*, 918 F.2d 763, 769 (9th Cir. 1990) ("to the extent *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength"); *See also Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D.Pa. August 13, 1992); *West v. Clinton*, 786 F. Supp. 803 (W.D. Ark. 1992).

[12] *See Turner v. State of Arkansas*, 784 F. Supp. 553, 567-571 (E.D. Ark. 1991), *aff'd*, 112 S.Ct. 2296 (1992) ("the Court is inclined to agree with the plaintiffs . . . that all of the *Gingles* court-created preconditions might not be required in every conceivable redistricting challenge under Section 2 . . . Nevertheless the facts of this case, precedent, and especially *Jeffers*, require adherence to such preconditions here").

The *Gingles* Court was also sharply divided over these preconditions. Justice O'Connor, in a concurring opinion, joined by three Justices, argued that the use of these preconditions disregarded the balance struck by Congress in amending § 2 between allowing vote dilution claims to be brought under § 2 and avoiding a right to proportional representation for minority voters. Justice O'Connor argued that the majority ignored "most of the *Zimmer* factors that were developed by the Fifth Circuit to implement *White's* results test and which were highlighted in the Senate Report," and that the majority's test for vote dilution "amounts to a right to usual, roughly proportional, representation on the part of sizable, compact, cohesive minority groups" inconsistent with the requirements of the Act. *Gingles*, 478 U.S. at 91-92 (O'Connor, J., concurring).

The electoral system at issue in *Chisom* was a combination of single-member and multimember districts. Yet this Court declined to reject a vote dilution claim for lack of judicially manageable standards when the *Gingles* preconditions clearly do not apply. The *amici* request that the Court, consistent with its decision in *Chisom*, reject the view of the United States that the *Gingles* preconditions apply to all claims that the drawing of single-member districts results in dilution of minority votes.

Assuming the *Gingles* test is a proper measure of vote dilution when minority voters challenge the use of multimember districts (and can comprise a majority in a single-member district) there is no basis in the Act, legislative history or precedent of this Court to apply this test to all vote dilution claims. The application of the *Gingles* preconditions to appellees' dilution claim based on "packing" would severely limit the breadth of the Act, an Act this Court has acknowledged to be a "broadly worded statute." *Chisom*, 111 S. Ct. at 2368.

III. THE VOTING RIGHTS ACT WAS NOT INTENDED TO LEAD TO THE POLITICAL SEGREGATION OF MINORITY VOTERS BY CREATING A FEW MAJORITY MINORITY DISTRICTS AND NEGATING ANY MINORITY INFLUENCE IN SURROUNDING DISTRICTS.

The approach of the Ohio Apportionment Board and recent redistricting developments in other states have led to concerns over the interpretation of the Voting Rights Act. Representative John Lewis (GA), a veteran of the civil rights movement and the only African-American Member of Congress from Georgia, has expressed doubts about the benefits to minorities of the federal courts' and United States Department of Justice's insistence on the creation of majority minority districts wherever possible.[13] According to Representative Lewis, "it looks too much like South Africa. It seems like we're creating little black townships." *USA Today*, May 11, 1992 at 2A.

Representative Lewis expressed two concerns. First, tortuously drawn districts that snake through areas with high concentrations of minorities have no sense of shared interests and no geographical balance. "You have to draw lines where people have a community of interest. You shouldn't just put people together because they are the same color." *Id.* Second, other districts—the vast majority—are sapped of their minority voting strength, leaving elected officials in these districts with little reason to represent minority viewpoints. "The whole intent of the civil

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[13] *See* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley (Dec. 18, 1991) (refusing to preclear North Carolina's congressional redistricting plan under § 5 of the Voting Rights Act for failing to create a second majority minority district); Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Mark H. Cohen (Jan. 21, 1992) (objecting to Georgia's congressional redistricting plan for failure to create a third majority African-American district); *See also DeGrandy v. Wetherell*, Slip op. 92-40015-WS (N.D. Fla. May 29, 1992).

rights movement was to create a truly interracial society. My goal is interracial democracy." *Id.*

Other observers have made similar points on the recent efforts to maximize the number of majority minority districts:

> More fundamentally, these developments raise the question whether some voting rights suits and remedies now being pursued around the country may—in the long run—do more harm than good, by spurring politicians to appeal only to members of their own race, and by putting the law's imprimatur on the notion that it's only natural to vote along racial lines.
>
> * * * *
>
> Are voting rights suits entrenching separate-but-equal elections as a permanent feature of the American landscape? Are they institutionalizing the kind of racially polarized politics we should be trying to get away from? Might they leave minorities and their representatives isolated?
>
> * * * *
>
> Almost every step that has been taken down this road has a certain logic. But with each new step—with almost no public debate—we seem to be perpetuating racial divisions by carving a principle of racial separation into our electoral system.
>
> * * * *
>
> The net long-term effect of creating as many black—and Hispanic—majority voting districts as possible could be to reduce black and Hispanic voters' influence over policy makers generally by leaving many white officeholders with little incentive to court them.

Turner, 784 F. Supp. at 560 (*quoting*, Taylor, "Voting By Race," *American Lawyer*, June 1991, at p. 50, 51)

The district court correctly held that the Voting Rights Act does not mandate a "per se requirement to create majority minority districts wherever possible." J.S. App.

8a. Such a requirement is inconsistent with the intent of the Act and legislative history. J.S. App. 10a-11a. The creation of such districts are only required when they are necessary to provide a protected class of voters an equal opportunity to participate in the political process and to elect candidates of their choice. *See, United Jewish Organizations v. Carey*, 430 U.S. 144, 164-166 (1977) (supermajority minority districts necessary to provide minority voters an opportunity to elect a representative of their choice due to low minority registration and turnout and significant racially polarized voting). By unnecessarily maximizing the number of majority minority districts, the plan drawn by the Ohio Apportionment Board has the effect of diluting the voting strength of African-American voters by limiting their electoral influence in the surrounding districts. J.S. App. 7a-8a.

The Voting Rights Act does not require jurisdictions to maximize the number of majority-minority districts. Although there is significant dispute concerning what constitutes undiluted minority voting strength, "there is substantial doubt that Congress intended undiluted minority voting strength to mean maximum feasible minority voting strength." *Gingles*, 478 U.S. at 94. (O'Connor, J. concurring). Justice O'Connor questioned the wisdom of the Court's approach in *Gingles*, noting that "requiring . . . every minority group that could possibly constitute a majority in a single-member district be assigned to such a district would approach a requirement of proportional representation as nearly as is possible within the framework of single-member districts." *Id.* 478 U.S. at 97 (O'Connor, J. concurring). Such an approach could conceivably lead to political segregation based on race and ethnicity. Minority voters would be assigned, and their voting strength limited, to just those districts where a majority minority district could be created.

The intent of the Voting Rights Act is not to politically segregate minority voters. A jurisdiction is not free to

create majority minority districts wherever possible if it is not necessary to provide minority voters an equal opportunity to participate in the political process and to elect representatives of their choice. In the absence of limits placed on a jurisdiction's discretion, our political system could resemble an American version of apartheid.

A jurisdiction should not be permitted to develop ingenious methods to limit the political power of minority voters by segregating them into a limited number of districts. In *Turner*, the Arkansas legislature adopted a congressional plan that provided African-American voters significant influence in three congressional districts (with African-American populations of 17.9%, 17.6% and 26.6%). Plaintiffs and the Arkansas Republican Party sought the creation of one district containing as high an African-American population as possible (42%) while leaving African-American voters with negligible influence in the remaining three districts.

The court, in rejecting the claim, questioned the motivation of the Arkansas Republican Party in identifying itself with the interests of the African-American plaintiffs in recommending one congressional district with a 42% African-American population:

> The unspoken assumption is that the Republicans in the proposed Fourth District will sacrifice their own political interest (wresting this seat from Democratic control) in favor of the larger objective of the Republican Party, i.e. to gain strength in the other two implicated congressional districts.

Turner, 783 F. Supp. at 563. The court reasoned that granting plaintiffs relief would not necessarily be in the best interests of the African-American community. Under the plan passed, African-American voters will exhibit influence in three congressional districts. However, under the Republican plan African-American voters would only be able to influence one, or possibly two, districts. *Id.* 784 F. Supp. at 571.

Like the Republicans in Arkansas, the Ohio Apportionment Board sought to limit the electoral strength of minority voters. Under the guise of protecting minority voting rights, the Board ignored the existence of coalitional voting and limited the political influence of minority voters for solely partisan purposes by maximizing the number of majority minority districts while dispersing the remaining minority population into overwhelmingly white districts. J.S. App. 7a. The Board intended to fracture and pack minority voters. J.S. App. 141a-143a. Although the protection of incumbents or the creation of districts to enhance a political parties opportunities is permissible, it may not be accomplished at the expense of minority voting potential. *Garza*, 918 F.2d at 771; *See also* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to John E. Pilcher (May 1, 1992) (denying preclearance to the 1992 redistricting plan for the board of education in Dallas County, Al.).

Nevertheless, it is important that minority voters who evidence a community of interest, geographic compactness and political cohesiveness are afforded an opportunity to elect their preferred representatives. There are many situations when it is necessary to create majority minority districts, for example, to compensate for legally significant racially polarized voting. However, the creation of such districts should not be used as an excuse to limit the electoral strength of minority voters.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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